In The
Supreme Court Of The United States

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, ET AL,

Appellants,

vs.

LYNN J. FRAZIER, ET AL,

Appellees.

APPELLEE'S BRIEF

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JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDNER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MEGEATH, E. A. ANDERSON, S. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, H. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLEE, W. W. COFELL, E. B. ROSCOE, C. H. KINNEY, on behalf of themselves, and all other taxpayers of the State of North Dakota,

Appellants,

vs.

LYNN J. FRAZIER, WILLIAM LANGER and JOHN N. HAGAN, acting and pretending to act as the Industrial Commission of North Dakota; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER,

OBERT OLSON, and THOMAS HALL, acting as the State Auditing Board; LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, and MINNIE J. NIELSON, constituting and acting as the Board of University and School Lands; OBERT OLSON, as State Treasurer of the State of North Dakota; CARL KOZITSKY, as State Auditor of the State of North Dakota, and LYNN J. FRAZIER, as Governor of said State, WILLIAM LANGER, as Attorney General of said State, JOHN N. HAGAN, as Commissioner of Agriculture and Labor of said State, THOMAS HALL, as Secretary of State of said State, and MINNIE J. NIELSON, as Superintendent of Public Instruction of said State, and LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN and MINNIE J. NIELSON, individually,

Appellees.

APPELLEES' BRIEF

STATEMENT OF THE CASE.

This is an ordinary taxpayers' suit. The action was brought in the United States District Court for the District of North Dakota. The appellants are forty-two in number and in their bill of complaint they allege that they are residents and taxpayers of the State of North Dakota. The purpose of the suit is to enjoin the appellees from paying out certain funds belonging to the State and raised by taxation, and from issuing and selling state bonds and using the proceeds thereof for the purpose of carrying out the industrial pro-

gram contemplated by certain Acts of the Legislature of the state, and certoin provisions of the Constitution of the state. The Acts involved were adopted by the Sixteenth Legislative Assembly and were and are known as House Bills 17, 18 and 49 and Senate Bills 130, 20, 75 and 19, which Acts purport to authorize such expenditure and the issuance of the bonds in question. These several Acts are set out in full in the record. (Tr. p. 21 fo. 28 et seq.)

The appellees are state officers. Their official character is correctly set forth in appellants' brief. (P. 3.)

Governor Frazier and Commissioner Hagen were and are represented by special counsel. The remaining appellees were and are represented by th Attorney General and his assistants. (Tr. ps. 52, 53, 66, 67, 68, 72.)

Th bill of complaint is set forth in full in the record. (Tr. p. 1, fo. 2 to p. 20 fo. 27). The answer is set forth in full in the record commencing Tr. p. 53 fo. 74 and ending p. 66 fo. 88. The extracts from the bill contained in appellants' brief are, so far as they go, correct.

On the 7th day of April, 1919, a motion to dismiss the suit was duly filed by the Attorney General. (Tr. p. 52 fo. 73½). On April 15, 1919, the Attorney General filed an answer on behalf of the appellees. (Tr. p. 53 fo. 74 et seq.). On April 25, 1919, the Attorney General filed a further motion to dismiss. (Tr. p. 67 fo. 90 et seq.). This motion was based upon the following grounds:

"Motion to Dismiss."
Filed April 25, 1919.
(Title of Case.)

Comes now the defendants and move the court to dismiss the bill of complaint of plaintiffs herein upon the points of law presented by the answer herein, upon the following grounds:

"First. The court is without jurisdiction to hear and determine this action because:

(a) The bill of complaint shows on its face that it is in effect an action against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued in this action.

(b) The bill of complaint fails to show that the matter in controversy, or cause of action, alleged therein arises under the laws or the Constitution of the United States.

(c) The bill of complaint fails to show that the interest of any one of the plaintiffs "in the matter in controversy exceeds in value the sum of three thousand dollars ($3,000.00)" and shows that the plaintiffs form a class of parties who have relation to the common fund sought to be administered.

Second. That there is a non-joinder of parties defendant to this action, for the reason that the bill of complaint on its face shows that the State of North Dakota is the real party defendant, and the State of North Dakota is not made a party defendant to the action and said State cannot be made a party defendant.

Third. That the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

WILLIAM LANGER,
Attorney General of the State of
North Dakota."

The motion to dismiss was heard upon the bill of complaint, answer and written motion. The learned trial court, on June 14, 1919, filed an opinion together with an order dismissing the bill, (Tr. p. 72 fo. 97 et seq.) and on the same day a decree dismissing the bill was duly entered. (Tr. p. 83 fo. 116 et seq). From that decree this appeal was taken by appellants.

Reduced to simplest form the motion to dismiss the ~~appeal~~ case was granted on the grounds:

"1. That the bill on its face shows that it is, in effect, a suit against the sovereign State of North Dakota and fails to show that the State of North Dakota has consented to be sued;

2. That the bill of complaint fails to show that the matter in controversy, the cause of action, alleged therein arises under the laws or the Constitution of the United States;

3. That the bill of complaint fails to show that the interest of any one of the plaintiffs "in the matter in controversy" exceeds in value the sum or amount of three thousand dollars;

4. That there is a non-joinder of parties defendant for the reason that the bill on its face shows that the State of North Dakota is the real party defendant and the State of North Dakota is not made a party defendant to the suit and said state cannot be made a party defendant;

5. That the bill of complaint does not state facts sufficient to constitute a valid cause of action in equity."

ARGUMENT

Jurisdiction

The complainants in this suit invoke the jurisdiction of the District Court of the United States for the District of North Dakota under the first paragraph of section 24 of the Judicial Code, 36 Stat. at L. 1091, upon the grounds:

(a) "That the suit arises under the "due process" and "equal protection" clauses of the fourteenth amendment to the Constitution of the United States, and under Section 4 Article IV of the same Constitution, which section guarantees a republican form of government to each of the several states;

(b) That the matter in controversy exceeds, exclusive of interest and costs, the sum or value of Three Thousand ($3,000.00) Dollars."

Jurisdictional Elements Must Be Alleged

The bill of complaint must show upon its face the elements requisite to confer jurisdiction upon the Court, and therefore must allege facts which show that the suit arises under some provision of the Constitution or laws of the United States, and that "the matter in controversy exceeds in value the sum of Three Thousand ($3,000.00) Dollars."

Re. Win, 213 U. S. 458;
Chappell vs. Waterworth 155 U. S. 102;
Tenn. vs. Union Bank 152 U. S. 454.

Measure Of Amount In Controversy

If the "amount in controversy" in this suit is the amount of the public funds appropriated by the legislature of North Dakota for carrying into effect the legislative enactments set out in the bill of complaint, and the amount of the bonds the issuance of which is authorized by such legislative

enactments, then the "amount in controversy" is several million dollars, and the trial Court had jurisdiction of the suit. On the other hand if the "amount in controversy" is the injury or damage that will result to either of the complainants by reason of taxes which he would be compelled to pay on account of the acts sought to be restrained, then the bill of complaint fails to show upon its face that the "amount in controversy" exceeds Three Thousand ($3,000.00) Dollars, and fails to allege a requisite jurisdictional element.

Defendants contend that in this suit which is to restrain an alleged illegal expenditure of public funds by public officials, and an alleged illegal issue of bonds by the State of North Dakota, which it is alleged will increase the taxes of the complainants, the "amount in controversy" is the injury or damage that will result to the complainants by the increase of their taxes, and not the amount of the public funds the expenditure of which is threatened, and the amount of the threatened issue of bonds, nor the total amount of the taxes threatened to be levied.

Colvin vs Jacksonville 158 U. S. 456;
Green vs Louisville & Interurban Railroad Company 244 U. S. 499;
Cowell vs City Water Supply Company 121 Fed. 53;
Resley vs Utica 168 Fed. 737;
Wheeler vs City of St. Louis 180 U. S. 399;
Rogers vs Hennepin County 239 U. S. 621.

Colvin vs Jacksonville, supra, was an action to restrain a threatened issue of bonds for One Million ($1,000,000.00) Dollars. It was found that the taxes of the complainant would not be increas-

ed in the sum of Two Thousand ($2,000.00) Dollars, the amount then necessary to confer jurisdiction on the Federal Court, if such bonds were issued. The trial Court held that it was necessary for the complainant to show that his taxes would be increased in the sum of at least Two Thousand ($2,000.00) Dollars in order for the Federal Court to acquire jurisdiction to try the action, and because the taxes of complainant would not be increased in such sum, dismissed the action for lack of jurisdiction. The trial Court certified to the Supreme Court the question as to whether the amount of the threatened issue of bonds, or the amount by which the taxes of the complainant would be increased if such bonds were issued, was *the amount in controversy* in the suit on the question of the jurisdiction of the trial Court. In deciding this question the Supreme Court at page 460 said:

> "This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the ruling of the Circuit Court was correct."

The question as to jurisdiction presented in the case at bar is precisely the same question that was presented in Colvin vs Jacksonville, supra, viz., is the "amount in controversy" the injury or damage which will result to the complainants, or the total amount of the public funds the expenditure of which is sought to be restrained, and the total amount of bonds the issuance of which is sought to be enjoined?

The bill of complaint in the case at bar does

not allege the assessed valuation of the taxable property in the State of North Dakota owned by the complainants, or by any one of them, and does not allege in what proportion taxes in the State of North Dakota generally will be increased, or in what amount the taxes of complainants, or any one of them, will be increased by the expenditure of the public funds or the issuance of the bonds alleged in the bill of complaint, and therefore fails to allege any facts from which the alleged amount of the injury or damage which will result to complainants, or any one of them, can be determined by the Court.

The right of any taxpayer in the State of North Dakota to maintain an action in the proper Court to restrain the issuance of the bonds mentioned in the bill of complaint, if such bonds are illegal, and if his taxes would thereby be increased, is conceded, for his property would be taken without "due process of law" to the extent which his taxes would be illegally increased. But the Court in which a taxpayer may litigate the question of the validity of such laws, and the legality of such bonds depends upon the amount of the monetary interest of such taxpayer in the bonds to be issued. Manifestly the monetary interest of such taxpayer is only the amount of taxes which he would be compelled to pay by reason of the legislation assailed. If such taxes amount to less than Three Thousand ($3,000.00) Dollars, then he must bring his suit in the State Court, notwithstanding that it may ultimately reach the Supreme Court of the United States for final decision as to the validity of the legislation; but if such taxes

amount to more than Three Thousand ($3,000.00) Dollars, then he may elect to bring his suit in the the District Court of the United States. That the suit arises under the Constitution or laws of the United States is not alone sufficient to confer jurisdiction on the District Court of the United States; but the monetary interest of the complainant in the matter in controversy must exceed Three Thousand ($3,000.00) Dollars, and the bill of complaint must so show.

Section 24 Jud. Code, 36 Stat. at L. 1091.

There is language in some of the cases which seems to support the proposition that in a suit by taxpayers to restrain an alleged unlawful expenditure of public funds, or illegal issuance of bonds, "the amount in controversy" as respects the jurisdiction of a Federal Court is the amount of such fund, or such bonds.

Brown vs Trousdale, 138 U. S. 389;
Crampton vs Zabriski, 101 U. S. 601;
Ottumwa vs City Water Supply Company, 119 Fed. 315;
Davenport vs Buffington, 97 Fed. 234.

Brown vs Trousdale, supra, greatly relied upon by appellants, is a case in which a large number of taxpayers of Muhlenburgh County, Kentucky, brought action *in the State Court* against the officers of the County, certain resident bond holders, and all other holders of bonds issued by the County to a railroad company in an amount of Four Hundred Thousand ($400,000.00) Dollars, or more, to have all the bonds declared illegal, to enjoin the collection of the bonds, and to enjoin the collection of taxes for the payment of interest thereon. Trousdale, owning such bonds to the

amount of Seven Thousand ($7,000.00) Dollars, and another person, both of whom were residents of the State of Tennessee, applied to the Court and were made parties Defendant to the action, *and thereupon procured an order of the State Court removing the case to the Federal Circuit Court, where a motion to remand the case to the State Court was denied.* On the pleadings, and agreed statement of facts and proof, the Circuit Court dismissed the bill. On appeal to the Supreme Court, it was decided *that the case was improperly removed to the Federal Court, the decree of the Circuit Court was reversed with directions to remand the case to the State Court.* This case was considered by the Court in Colvin vs Jacksonville, supra, and the statement made that Brown vs Trousdale, is not contrary to the decision in the former case. So the statement in Brown vs Trousdale to the effect that the matter in controversy is the amount of the bonds, is modified by Colvin vs Jacksonville, and Brown vs Trousdale is not an authority on that proposition.

In Crampton vs Zabriski, supra, the Board of Chosen Freemen of Hudson County, New Jersey, purchased from Crampton certain real property, conveyance of which to the County was executed by him, and issued to him in payment therefor bonds of the County in excess of Two Hundred Thousand ($200,000.00) Dollars. These bonds were issued in violation of a State law prohibiting the expenditure by a County in any year of a greater sum than the taxes levied for that year. The Supreme Court of the State by writ of certiorari reviewed the actions of the Board issuing

the bonds, and by its decision declared the proceedings for the issuance of bonds illegal and the bonds void. At the maturity of the bonds Crampton, who was not a resident of the State of New Jersey, brought an action at law in the Federal Court to collect the bonds, the complaint in which action showed the requisite jurisdictional amount. Zabriski and other resident taxpayers of the County then brought an action in equity in the Federal Court to enjoin further proceedings in the action at law by Crampton to have the bonds declared void and to compel a surrender thereof by Crampton, and a reconveyance of the property to him. The Federal Court had undoubted jurisdiction of the action at law by Crampton, and as the action in equity by Zabriski was ancillary to and a part of the action at law, the Court acquired jurisdiction in the equitable action by reason of its jurisdiction in the action at law. Therefore, the statement of the Court that,

> "Resident taxpayers have a right to invoke the interposition of a Court of equity to prevent an illegal disposition of the moneys of the County."

Was not made with reference to the jurisdictional amount, and is only a statement that such taxpayers have such right when the action is brought in the proper Court, which right is conceded by Defendants. Crampton vs Zabriski was decided prior to the decision in Colvin vs Jacksonville, supra, and any language in the former case which is not in harmony with the decision in the latter case, must be deemed to be modified or qualified by the latter decision.

In Ottumwa vs City Water Supply Company, supra, the City of Ottumwa, Iowa, was about to issue municipal bonds in excess of Three Hundred Thousand ($300,000.00) Dollars, in violation of a constitutional provision of the State of Iowa, for the construction of municipal water works. The City Water Supply Company, a taxpayer of said City, brought an action in the Federal Court to enjoin the issuance of the bonds, and alleged in its bill of complaint that its taxes would be increased in excess of Three Thousand ($3,000.00) Dollars by the issuance of the bonds. The Court says in paragraph I, page 318:

> "The amount in dispute in this suit, if only measured by the injury to the complainant from the increased taxation of its property in the City of Ottumwa necessary to provide for the payment of the bonds proposed to be issued for the construction of the new water works was more than sufficient to sustain the jurisdiction of the Circuit Court."

The Court further said in paragraph II that

> "The matter in dispute was whether the City had power and authority to issue bonds in a sum in excess of Three Hundred Thousand ($300,000.00) Dollars."

Since the interest of complainant was sufficient o confer jurisdiction, the latter statement is obit- r and is clearly in conflict with the decision in olvin vs Jacksonville, supra, and should not be nsidered as an authority.

In Davenport vs Buffington, the action was by xpayers to restrain the officials of the City of wningville, Indian Territory, from dividing up d selling as town lots a park in said City which d been dedicated to the public. When this case

was commenced, the tribal courts of the Cheroke nation had exclusive jurisdiction of all cases aris ing in the Cherokee country in which members o that tribe were the only parties, while the Unite States Courts in the Indian Territory had juris diction of every civil case arising between a citi zen of the United States and any citizen or per son residing in the Indian Territory. All partie to the action except one Tarrant were members o the Cherokee nation. Tarrant was a citizen o the United States and a resident taxpayer in th City of Downingville. The question of jurisdic tion was whether the action should have bee brought in the tribal courts of the Cherokee na tion. The Court held that because Tarrant wa a citizen of the United States the action was prop erly brought in the United States Court of the In dian Territory. No question of an amount neces sary to confer jurisdiction on the trial Court wa involved in the case. The action was brought i the proper court without regard to the value of th interest of the complainant, and therefore th statement of the Court to the effect that a taxpay er has the right to restrain an illegal disposition of the property of a City, was only a statement o the general principle that a taxpayer has such right when his action is brought in the prope Court, and is not a statement that a taxpayer ca bring such action in the Federal Court witho a showing that his damage is in excess of Thre Thousand ($3,000.00) Dollars.

Colvin vs Jacksonville has never been qualifie by any decision of the Supreme Court; and a examination of subsequent decisions will sho

that complainants in actions brought by taxpayers to restrain alleged illegal taxation, have been careful to allege that the taxes of such complainant by reason of the acts sought to be restrained would exceed Three Thousand ($3,000.00) Dollars.

INTERESTS OF COMPLAINTS CANNOT BE AGGREGATED TO MAKE UP JURISDICTIONAL AMOUNT

The bill of complaint fails to allege facts showing that the combined taxes of all the Plaintiffs would be increased in a sum in excess of Three Thousand ($3,000.00) Dollars by the legislation assailed; but even if the bill of complaint should so show, the Defendants contend that the value of the interests of the several Plaintiffs cannot be aggregated to produce the amount required to give the Court jurisdiction.

Clay vs Field, 138 U. S. 464;
Walter vs N. E. Ry. 147 U. S. 370;
Wheeless vs St. Louis, 180 U. S. 379;
Hope vs Bergemen, 60 Fed. 1;
Jones vs Mutual Fidelity Company, 123 Fed. 506;
Ex. parte Baltimore & O. R. Co. 106 U. S. 5;
Rogers vs Hennepin County, 239 U. S. 621.

In Wheeless vs St. Louis, supra, several owners of separate lots abutting on a City street, brought an action in the Federal Court to enjoin the City from making improvements on such street by special assessment against the property abutting thereon. It was shown that the assessment against no one complainant would be in excess of Three Thousand ($3,000.00) Dollars. The bill was dismissed, and the Court said:

"Distinct and separate interests of complainants in a suit for relief against assess-

ments, whether they are made or merely threatened, cannot be united for the purpose of making up the amount necessary to give the Court jurisdiction."

In Rogers vs Hennepin County, supra, claimants representing themselves and others numbering altogether more than five hundred-fifty, brought an action against Hennepin County and certain of its officers to restrain taxation against complainants by reason of their membership in a certain organization. It was shown that the taxes against no one complainant would exceed Forty ($40.00) Dollars, and the Court dismissed the action because the interest of no one claimant was sufficient to give the Court jurisdiction, and the interests of the complainants could not be aggregated for that purpose.

In Clay vs Field, supra, the Court said:

"The general principle is that if several persons be joined in a suit in equity or admiralty and have a common and undivided interest, although separable as among themselves, the amount of the joint claim or liability will be the test of the jurisdiction; but where their interests are distinct and they are joined for the sake of convenience only and because they form a class of parties whose rights or liabilities arose out of the same transaction, or for relief under a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving the Court jurisdiction, but each must stand or fall by itself alone."

Discussing this question (Tr. p. 73 fo. 99 et seq.) the learned trial court said:

"2. Plaintiffs assert that in suits to restrain an unconstitutional use of public funds

or issue of bonds, or levy of tax, the amount of the funds or of the bonds or of the tax is the measure of the 'amount' in controversy and not the injury to plaintiffs. There is some language in the cases which supports that view. It is, however, at variance with the decision of the Supreme Court in Colvin vs Jacksonville 158 U. S. 456, and with the uniform practice in Federal Courts since that decision has become known to the profession. That was a taxpayers' suit. It was brought to restrain a threatened issue of bonds for one million dollars. It was proven that the amount of taxes which would be levied on plaintiff's property in case the bonds were issued would be less than $2,000, the amount then necessary to confer jurisdiction, and the trial court dismissed the bill for want of jurisdiction. Plaintiff insisted that the amount of the bond issue, and not his tax liability, was 'the amount in controversy,' and at his instance the court certified the question of jurisdiction to the Supreme Court. Anyone who will read the certificate as set forth at page 458 of the report, will see that the exact question involved under this heading of the present case was there presented to the Supreme Court. In deciding it the court says, at page 460: 'This leaves the only question to be considered whether the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect of that, we have no doubt the the ruling of the Circuit Court was correct.' The court then examines Brown vs. Trusdale, 138 U. S. 389, which was cited to me by counsel for the plaintiffs, and then orders decree affirming the decision of the lower court. It is plain, therefore, that the court there regarded Brown vs. Trusdale as in harmony with the decision which it was rendering, or that its language ought to be qualified so as to bring it into harmony.

The case of Colvin vs. Jacksonville, supra, is not referred to by the Circuit Court of Appeals of this circuit in its opinion in City of Ottumwa vs. City Water Supply Company, 119 Fed. 315.

Plaintiff's interest in the Ottumwa case was sufficient to confer jurisdiction, so the language in the second paragraph of the opinion on page 318 was obiter, and, as it is in direct conflict with the decision in the Colvin case, must be treated as an erroneous statement of the law.

Colvin vs. Jacksonville has never been qualified or criticised by the Supreme Court or any circuit court of appeals. From the date of that decision to the present time it has been the uniform practice in taxpayers' suits to restrain an issue of bonds, or a levy of taxes, to show that plaintiffs' threatened damage was sufficient to confer jurisdiction. The latest decision on the subject is Greene vs. Louisville & Interurban Railroad Co., 244 U. S. 499-508. See also Orleans-Kenner Electric Ry. Co. vs. Dunbar 218 Fed. 344; Cowell vs. City Water Supply Co., 121 Fed. 53, and Resley vs. Utica, 168 Fed. 737.

In suits to enjoin a threatened tax levy, and that is the nature of the suit here, in all its aspects, the authorities are uniform that the individual plaintiffs *must each* have an interest to the amount of $3,000, and that several plaintiffs cannot aggregate their interests for the purpose of making up the $3,000. Wheelees vs. City of St. Louis, 96 Fed. 865; same case, 180 U. S. 399; Rogers vs. Hennepin Co., 239 U. S. 621.

How then are the numerous cases referred to in Dillon on Municipal Corporations, 5th Edition, Section 1579, et seq., and cited to the court in argument, to be explained? That is not difficult. None of them asserts rights under the Fourteenth Amendment. They all involve cases in which cities were attempting

to levy taxes or issue bonds in violation of *state laws* or *state constitutions.* With the exceptions presently to be mentioned, the cases all arose in state courts. There it is not necessary for a plaintiff to show any particular amount as the basis of jurisdiction. Taxpayers may sue in the state courts, and claim the protection of the Fourteenth Amendment without showing that they have a personal interest amounting to $3,000. The only object of the averment that they are taxpayers is simply to show that they are not intermeddlers. If the state courts deny to taxpayers thus asserting rights under the Fourteenth Amendment, a writ of error to the Supreme Court of the United States will lie to review the decision. This distinction must be kept constantly in mind in examining decisions of the Supreme Court. Was the case brought before that court by writ of error from the highest court of the state, or by writ of error or appeal to review the decisions of a Federal Circuit, or District Court. In one case the amount involved is immaterial, and in the other it is controlling.

It remains to notice two cases which are relied on by plaintiffs. The first is Crompton vs. Zabriski, 101 U. S. 601. That involved an issue of bonds by the county of Hudson in the State of New Jersey for several hundred thousand dollars.

The bonds were illegal because no provision for their payment by tax levy was made as the law required. On certiorari to the board issuing the bonds, a judgment was entered by the Supreme Court of the state, declaring them void. Notwithstanding this judgment, the bonds were issued to the plaintiff, Crompton. He then brought an action at law to collect the bonds in the Federal Court. Jurisdiction of this action was based upon diversity of citizenship and the complaint showed

the requisite jurisdictional averment. Zabriski and two other resident taxpayers of the county thereupon filed a bill of complaint on the equity side of the Federal Court, praying that the bonds be declared void, and be delivered up, and that the board be ordered to reconvey the property to Crompton, and that he be enjoined from prosecuting the action at law or parting with the bonds in any other way than by surrendering them to the board. This bill was, of course, ancillary, and jurisdiction of the Federal Court to entertain it rested upon its jurisdiction over the action brought by Crompton. Such being the nature of the suit, two facts are clear; First, that the taxpayers' rights were based on a violation of state law, and not on the Fourteenth Amendment. Second, That jurisdiction of the court was based on the original action brought by Crompton, and the complaint in that clearly showed a right in the plaintiff sufficient to confer jurisdiction. What the court says in the passage quoted by counsel about the right of taxpayers to maintain a suit in equity to prevent an illegal disposition of the moneys of the county, or the illegal creation of a debt, is addressed to the question whether taxpayers have a right to maintain such suit to protect their own interests, and has nothing to do with the question for which the quotation was cited in the argument here, namely, the right of taxpayers to assert rights of the state, or of a city. Mr. Justice Field in the language used, is answering the contention that a taxpayer under no circumstances can maintain such a suit. Such is the holding of the courts of New York and several other state courts. Dillon on Municipal Corporations, 5th Edition, Section 1585.

The other case cited by plaintiffs here is Daveport vs. Buffington, 97 Fed. 234. That came before the Circuit Court of Appeals of this Circuit on appeal from the Supreme

Court of the Indian Territory. It involved therefore no question of jurisdiction of the trial court, as a Federal Court, depending upon a showing that the plaintiff had a right of the value of $3,000. The suit was brought by taxpayers to prevent the use of property which had been given to the city for a park for other purposes. The taxpayers filed their bill to enforce this trust. No right is asserted under the Fourteenth Amendment. The passage quoted simply goes to the general question of the right of taxpayers to maintain suits in equity to prevent a misuse of property or funds belonging to a city.

It may be doubted whether taxpayers may maintain a suit against state officers to vindicate alleged rights of a state. I have been unable to find any authority that would support such a doctrine. Such suits have been confined to actions against municipal officers to vindicate the rights of cities. Such are all the cases cited by Judge Dillon in his work on Municipal Corporations, Section 1579. The reasons which permit such suits in the case of municipal corporations has no application to states. Municipal corporations exist under special charters and have only such powers of taxation as are specifically conferred upon them. They have many of the qualities of a private corporation and the right to maintain taxpayers' suits has been rested upon the same ground as the right of stockholders to maintain similar suits in behalf of a private corporation. States are not municipal corporations. Their powers are not defined by charter. They possess all powers except as they are limited by the state and federal constitutions. This is especially true of their power to tax. The power to maintain taxpayers' suits even against municipal officers has been denied by the courts of New York, Massachusetts and several other states. Dillon, Sec. 1585, et seq. I can find no justification for ex-

tending the doctrine to actions against state officers.

From this examination, the conclusion necessarily follows that plaintiffs must show a personal interest amounting to $3,000, in order to give this court jurisdiction, and as no such showing is made in the present bill, the jurisdiction of the court as a federal court fails."

ACTION IN EFFECT AGAINST THE STATE

It is elemental that the State cannot, without its consent, be sued either in its own Courts or Courts of the United States, by citizens of another State or by its own citizens.

Hans vs Louisiana, 134 U. S. 1;
Smith vs Reeves, 178 U. S. 232;
11th Amendment Const. U. S.

Whether or not an action brought against the officers of a State is in effect an action against the State, is often a very perplexing question, and the determination of this question depends upon the facts in each particular action, and must be determined by a consideration of the nature of the case as presented by the whole record. Where the State is not a party to an action and its rights are affected by the judgment, the action is in effect an action against the State, and the Court acquires no jurisdiction.

Foster's Federal Practice, page 390;
Poindexter vs Greenow, 114 U. S. 270;
In re: Ayers, 123 U. S. 443;
Fitz vs McGhee, 172, U. S. 516;
Louisiana vs Jumel, 107 U. S. 711;
Hagood vs Southern, 117 U. S. 52;
Cunningham vs Macon & Brunswick Ry. Co., 109 U. S. 46;
Elliott vs Wiltz, 107 U. S. 711;
Oregon vs Hitchcock, 202 U. S. 60;

Wells vs Roeper, 246 U. S. 335;
Belknap vs Schild, 161 U. S. 11.

In Fitz vs McGhee, supra, the Court said:

"To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted, not literally and too narrowly but fairly, and with such breadth and largeness as effectually to accomplish the substance of its purpose. In this spirit is must be held to cover, not only suits brought against a State by name, but those also against its officers, agents, and representatives, where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates *****As a State can act only by its officers, an order restraining those officers from taking any steps in execution of a statute, is one which restrains the State itself, and the suit is consequently as much against the State as if the State was named as a party Defendant on the record."

Plaintiffs allege in paragraph 8 of the bill of complaint, pp. 3 and 4 f. 5 of the transcript, that there are public funds in the Treasury of the State of North Dakota, amounting to more than Three Hundred Thousand ($300,000.00) Dollars, which funds will be expended pursuant to the appropriations made by the legislative enactments set out in the bill; and paragraph 13 of the prayer of the bill of complaint, p. 19 f. 25 of the transcript, asks that the Defendants be restrained from paying out or disbursing the money in the State Treasury, appropriated by such legislation.

Defendants contend that as to the money in the State Treasury when this suit was commenced,

the expenditure of which is sought to be restrained, the State is a necessary party, and the action is in effect an action against the State. The decree, if in favor of the complainants, will limit and control the sovereign political power of the State in the administration of its finances. If there is any trust as to such money, the State is the trustee. The State Treasurer is only custodian of such money as an agent of the State, and his acts with reference thereto are the acts of the State. No Court can acquire jurisdiction in an action directly against the State, without its consent, to regulate or control the disbursement of money in its Treasury, neither can it acquire jurisdiction over the officers in charge of such money so as to control their actions with reference thereto as against the political power of the State.

In La. vs Jumel, supra, which was an action by mandamus against the State Treasurer and other State officers to compel the State Treasurer to apply money in the Treasury, derived from taxation for a particular purpose, to the purpose for which the money was raised, and to enjoin him from transferring such money to the general funds of the State, the Court said:

> "The Treasurer of the State is not a trustee of moneys in the State Treasury, he holds them only as the agent of the State. If there is any trust, the State is the trustee, and unless it can be sued, the trustee cannot be enjoined. Courts cannot, when the State cannot be sued, set up jurisdiction over the officers in charge of public moneys, so as to control them as against the political power in their administration of the finances of the State."

In Belknap vs Schild, the action was against officers in the military service of the United States by a patentee of a caisson gate, to enjoin the use thereof by such officers who had not procured from the patentee permission to use or manufacture the patented article, and the Court said:

> "But no injunction can be issued against officers of a State, to restrain or control the use of property already in the possession of the State, or money in its Treasury when the suit is commenced; or where the State has otherwise such an interest in the object of the suit as to be a necessary party."

In Cunningham vs Macon & Brunswick Ry. Company, supra, the action was against the Governor and Treasurer of the State in foreclosure proceedings against a railroad in the possession of the State, and to which it had legal title, in dismissing the bill of complaint on demurrer, the Court said:

> "The bill is to all intents and purposes a suit against the State. It is her property and not that of the State officers that is to be affected by the decree of the Court. The attack is not made against the State directly but through her officers. This indirect way of making the State a party is just as open to objection as if the State had been named as a Defendant."

ADOPTION OF STATE CONSTITUTION A POLITICAL QUESTION

Plaintiffs allege in the bill of complaint that ection 182 of Article XII of the Constitution of orth Dakota, with reference to the debt limit of e State, and Section 185 of Article XII of said nstitution, which amendment specifically per- ts the State to engage in any industry, enter-

prise or business not prohibited by Article XX of the same Constitution, did not receive a majority of all the legal votes cast at the election in 1918, at which said question was voted upon. (See paragraphs XIII and XIV bill of complaint, pp. 6 and 7 f. 8 and 9 transcript). The bill of complaint further alleges that the sixteenth legislative assembly of the State of North Dakota approved the constitutional amendments referred to. (See bill of complaint, paragraph XVI transcript, p. 7 f. 10). Thus the bill of complaint shows on its face that the political power and authority of the State of North Dakota determined that such constitutional amendments were legally and properly adopted.

> "The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution, cannot be settled in a judicial proceeding. The political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the State; and the judicial power has followed its decisions; and the Courts of the United States adopt and follow the decisions of the State Courts which concern merely the constitution and laws of the State."

Luther vs Borden, 7 How. 1, 12 L. ed. 581.

In State ex. rel. Byerley vs Board of Canvassers, 172 N. W. 80 (N. D.), the Supreme Court of the State of North Dakota decided that the amendments to the Constitution of the State of North Dakota hereinbefore mentioned were legally adopted by the voters of the State.

Therefore the question as to whether the constitutional amendments referred to were adopted

is not a judicial question to be determined in this action.

WHETHER A STATE MAINTAINS A REPUBLICAN FORM OF GOVERNMENT IS NOT A JUDICIAL QUESTION.

Plaintiffs allege that the legislation assailed is in violation of the fundamental principles of a republican form of government. (See paragraph 20 bill of complaint, transcript p. 11 f. 14).

Whether any State maintains a republican form of government is purely a political question, not cognizable by the Courts.

Marshall vs Dye, 231 U. S. 250;
Pacific State Telephone & Telegraph Co. vs Oregon, 223 U. S. 118;
Kiernan vs Portland, 223 U. S. 151;
Ohio ex. rel. Davis vs Hildebrant 241 U. S. 565;
Mountain Timber Company vs Washington, 243 U. S. 219.

In Pacific States Telephone & Telegraph Company vs Oregon, supra, the Court said:

> "Whether the adoption of amendments to the Constitution of a state so alter the form of government of the State as to make it no longer republican, within the meaning of Section 4 Article IV of the Constitution, is a purely political question, and therefore not cognizable by the judicial power, but one solely to be determined by Congress."

FURTHER UPON THE QUESTION OF JURISDICTION

In support of their contention that the trial court had jurisdiction and committed error in dismissing the suit for want of jurisdiction appellants' counsel cite the recent case of

Green et al vs Frazier et al, 176 N. W. 11, (N. D.)

and in commenting thereon say:

"So thoroughly is the rule established in North Dakota that in the recent 'friendly case' Green, et al. v. Frazier, et al, 176 N. W. 11, involving the validity of the legislative Acts which are attacked in the present action and brought by only four taxpayers, all from the same County, and in which the defendants are the same State Officials who are named as defendants in the case at bar, and were represented by the same counsel, no question of the right of the four taxpayers to maintain that action on behalf of themselves and other taxpayers of the State was raised." (Appellants brief p. 31).

Passing for the present counsel's reference to this case as a "friendly case" we need only remind the court that the case was instituted in the *state court* which unquestionably had jurisdiction regardless of the amount involved and therefore the Supreme Court of North Dakota had no occasion to consider the question of jurisdiction, the question with which we are now dealing.

Many of the cases cited by appellants' counsel in their voluminous brief were, like Green vs Frazier, supra, cases that originated in the state courts or in courts in which no particular amount was necessary to confer jurisdiction. Cases of that kind, of course, have no application to the question of the jurisdiction of the district courts of the United States in taxpayers' suits brought by residents of the state in which the actions are brought.

As already shown and as admitted by appellants, the appellants are all residents of the state of North Dakota. Jurisdiction, therefore, was not founded upon diverse citizenship. It was con

ceded that whatever jurisdiction the trial court acquired it acquired under the provisions of Section 24 of the Judicial Code which is as follows:

> "Sec. 24. The District Court shall have original jurisdiction as follows: First, Of all suits of a civil nature at common law or in equity.....where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, :and (a) arises under the Constitution or laws of the United States....."

Inasmuch as the appellants were all residents of the State of North Dakota it goes without saying that the trial court could not found jurisdiction alone upon a violation of any law or constitutional provision of that state. To give court jurisdiction it was necessary that two facts appear upon the face of the bill, namely;

1. That a violation of the Fourteenth Amendment to the Federal Constitution was either threatened or committed, and
2. That the matter in controversy exceeded, exclusive of interest and costs, the sum or value of three thousand dollars.

There are forty-two plaintiffs but whether they are active, bona fide litigants or whether the use of their names as plaintiffs was solicited by others more deeply interested in instituting and carrying on the litigation we shall not stop to discuss; suffice it to say that it does not appear on the face of the complaint that the taxes of either of these forty-two plaintiffs or of all of them combined will be increased to the extent of three thousand dollars by reason of the enforcement of the laws here involved and the carrying out of the industrial program foreshadowed in those laws. Therefore,

so far as the plaintiffs are concerned (and that must be the test), the amount in controversy does not exceed *the sum or value* of three thousand dollars. For the reasons already given and the authorities cited we conclude that the trial court had no jurisdiction of the suit and committed no error in dismissing the suit for want of jurisdiction.

AMENDMENTS TO CONSTITUTION OF NORTH DAKOTA PROPERLY ADOPTED

Complainants allege in paragraph 15 of the bill of complaint, p. 7 f. 9 of the transcript, that the amendments to Sections 182 and 185 of the Constitution of North Dakota, which amendments are set out in the bill of complaint, did not receive a majority of all the legal votes cast at the general election in November, 1918, at which said proposed amendments were voted upon, and that said amendments were not properly adopted.

Subdivision 2 of Section 202 of the Constitution of North Dakota as amended by Article 16 of amendments thereto is as follows:

> "Any amendment or amendments to this Constitution may also be proposed by the people by the filing with the Secretary of State, at least six months previous to a general election, of an initiative petition containing the signatures of at least twenty-five per cent of the legal voters in each of not less than one-half of the counties of the state. When such petition has been properly filed the proposed amendment or amendments shall be published as the legislature may provide, for three months previous to the general election and shall be placed upon the ballot to be voted upon by the people at the next general election. Should any such amendment or amendments proposed by initiative petition and sub

mitted to the people receive a majority of all the legal votes cast at such general election, such amendment or amendments shall be referred to the next legislative assembly, and should such proposed amendment or amendments be agreed upon by a majority of all the members elected to each house, such amendment or amendments shall become a part of the Constitution of this state."

Section 182 of the Constitution of North Dakota as originally adopted, and prior to the amendment thereof hereinafter set forth was as follows:

"The state may, to meet casual deficits or failure in the revenue, or in case of extraordinary emergencies, contract debts, but such debts shall never in the aggregate exceed the sum of two hundred thousand dollars, exclusive of what may be the debt of North Dakota at the time of the adoption of this constitution. Every such debt shall be authorized by law for certain purposes to be definitely mentioned therein, and every such law shall provide for levying an annual tax sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax discontinued until such debt, both principal and interest, shall have been fully paid. No debt in excess of the limit named shall be incurred except for the purpose of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for public defense in case of threatened hostilities; but the issuing of new bonds to refund existing indebtedness, shall not be construed to be any part or portion of said two hundred thousand dollars."

Section 185 of the Constitution of North Dakota as amended by Article 18 of Amendments thereto is as follows:

> "Neither the state nor any county, city, township, town, school district or any other political sub-division shall loan or give its credit or make donations to or in aid of any individual, association or corporation except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the state engage in any work of internal improvement unless authorized by a two-thirds vote of the ple. Provided, that the state may appropriate money in the treasury or to be thereafter raised by taxation for the construction or improvement of public highways."

At the general election held in the State of North Dakota on the 5th day of November, 1918, the question of amending Sections 182 and 185 of the Constitution of North Dakota was submitted to the electors of the State in accordance with the provisions of Section 202 of the Constitution, petitions for such submission having been previously filed with the Secretary of State. The question submitted to the electors with reference to Section 182 of the Constitution was whether said section should be amended to read as follows:

> "(Section 182 in Article 12). The state may issue or guarantee the payment of bonds, provided that all bonds in excess of two million dollars shall be secured by first mortgages upon real estate in amounts not to exceed one-half of its value; or upon real or personal property of state owned utilities, enterprises or industries in amounts, not exceeding its value, and provided, further, that

the state shall not issue or guarantee bonds upon property of state owned utilities, enterprises or industries in excess of ten million dollars.

"No further indebtedness shall be incurred by the state unless evidenced by a bond issue, which shall be authorized by law for certain purposes, to be clearly defined. Every law authorizing a bond issue shall provide for levying an annual tax or make other provisions, sufficient to pay the interest semi-annually, and the principal within thirty years from the passage of such law, and shall specially appropriate the proceeds of such tax, or of such other provision, to the payment of said principal and interest, and such appropriation shall not be repealed nor the tax or other provisions discontinued until such debt, both principal and interest, shall have been paid. No debt in excess of the limit named herein shall be incurred except for the purposes of repelling invasion, suppressing insurrection, defending the state in time of war, or to provide for the public defense in case of threatened hostilities."

The question submitted to the voters at said ection with reference to Section 185 of the Contution, was whether said section should be ended to read as follows:

"(Section 185 in Article 12 as amended by Article 18 of amendments). The state, any county or city, may make internal improvements and may engage in any industry, enterprise or business, not prohibited by Article 20 of the Constitution (which later Article prohibits the manufacture or sale of intoxicating liquors); but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation, except for reasonable support of

the poor, nor subscribe to or become the owner of capital stock in any association or corporation."

The State Board of Canvassers of the State of North Dakota certified that at said election there were cast 46,275 ballots in favor of amending Section 182 of the Constitution as hereinbefore set forth, and 34,235 ballots were cast against such amendment; and said State Board of Canvassers certified that said proposed, initiated amendment was duly carried, adopted, approved and ratified.

Said State Board of Canvassers certified that at said general election 46,830 ballots were cast in favor of amending Section 185 of the Constitution as hereinbefore stated, and that 32,574 ballots were cast against such amendment, and further certified that said proposed initiated amendment was duly carried, adopted, approved and ratified.

See Session Laws of North Dakota, 1919, pp. 507 and 508.

By a concurrent resolution adopted by a vote of the majority of the members of both houses of the legislative assembly of the State of North Dakota, the amendment to Section 182 of the Constitution of North Dakota was duly declared adopted by the electors of said State and a part of the Constitution thereof, which concurrent resolution was approved January 20, 1919.

Session Laws of North Dakota, 1919, Chap. 85.

By a concurrent resolution adopted by a vote of the majority of the members of both houses of the legislative assembly of the State of North Da-

ota, which concurrent resolution was approved January 20, 1919, the legislative assembly of the State of North Dakota declared that the amendment to Section 185 of the Constitution was duly adopted by the electors of the State, and had become a part of the Constitution of the State.

Session Laws of North Dakota, 1919, Chap. 89.

Thus the political power of the State of North Dakota has declared that the amendments to Sections 182 and 185 of the Constitution were properly adopted.

It is the contention of Defendants that the question whether or not an amendment to a constitution of a state has been adopted by a majority of the electors, at an election upon such question, is not a judicial question, and cannot be determined by the Court.

In Luther vs Borden, 7 How. 1, the Court said:

> "The question whether or not a majority of those persons entitled to suffrage voted to adopt a constitution, cannot be settled in a judicial proceeding; the political department has always determined whether a proposed constitution or amendment was ratified or not by the people of the state; and the judicial power has followed its decisions, and the Courts of the United States adopt and follow the decisions of state courts which concern merely the constitution and laws of the state."

In State ex. rel. Byerley vs Board of Canvassers, 172 N. W. 80 (N. D.), an application by the state, on relation of W. E. Byerley, a taxpayer, was made to the Supreme Court of the State of North Dakota, for a writ of certiorari to the

State Board of Canvassers, for the purpose of reviewing the proceedings and certificate of said Board of Canvassers on the question of the adoption of the amendments hereinbefore mentioned to Sections 182 and 185 of the Constitution of North Dakota. The Court issued an order requiring the State Board of Canvassers to show cause why such writ should not be issued. On the hearing on such order, the Court decided that such amendments were properly adopted by a majority of the legal votes cast at the election at which such amendments were submitted to the electors, and that the certificate of the Board of Canvassers to the effect that such amendments had been properly adopted was correct, and denied the application for the writ of certiorari.

Pursuant to provisions of the Constitution of North Dakota, certain legislative enactments set out in the bill of complaint herein, towit: House Bill No. 17, known as the "Industrial Commission Act," and House Bill No. 18, known as the "Bank of North Dakota Act," were submitted for rejection or approval to the electors of the State of North Dakota at a special election held for that purpose on June 26, 1919, at which election 61,188 votes were cast in favor of said "Industrial Commission Act," and 50,271 votes were cast against said Act; and 61,495 votes were cast in favor of said "Bank of North Dakota Act," and 48,239 votes were cast against such Act, as shown by the certificate of the State Board of Canvassers, Session Laws, North Dakota, 1919, pages 509 and 510.

Thus it is apparent that a substantial majority f the electors of the State of North Dakota have eclared in favor of the industrial and economic rogram provided for by the legislative enact- ents attacked in this action, both by adopting mendments to the constitution of the state so that uch enactments would not contravene any pro- ision of the constitution, and also by approving t an election held for that purpose such of the egislative enactments as were submitted to the lectors for their rejection or approval.

Subsequent to the legislative enactments men- ioned in the bill of complaint herein, the Govern- r and State Treasurer of the State of North Da- ota executed bonds of the State of North Dakota ursuant to House Bill No. 49, known as the Bank of North Dakota Bond Act," in ie sum of Two Million Dollars ($2,000,- 00.00), and requested the Secretary of tate of said State to certify on each of aid bonds that the same was issued pur- uant to law and was within the debt limit of the tate, which certificate is required by Section 1 of e Act mentioned. The Secretary of State re- sed to make such certificate, claiming that pur- ant to Section 182 of the Constitution of the ate as amended, the State could legally issue ch bonds only to the amount of Two Million Dol- rs ($2,000,000.00) including any bonds of the ate outstanding at the time. Action in manda- us was brought by the State on the relation of e Attorney General against the Secretary of ate to compel him to place such certificate upon ch of said bonds. The Court decided that Sec-

tion 182 of the Constitution as amended authorized the issuance of bonds by the State, unsecured, except by the faith and credit of the State, to an amount of Two Million Dollars ($2,000,000.00), exclusive of any bonds of the State then outstanding, and by a peremptory writ of mandamus, required the Secretary of State to certify that each of said bonds was issued pursuant to law and was within the debt limit of the State.

State ex. rel. Langer, Atty. Gen. vs Hall, Secy of State.

IS THE PURPOSE FOR WHICH THE FUNDS IN QUESTION ARE BEING RAISED A PUBLIC PURPOSE?

Is the legislation involved in this litigation unconstitutional under the Fourteenth Amendment? Is the use for which the funds are to be raised under the legislation in question a *public use* or *a mere private use?*

No unvarying test has yet been established or even formulated by which it may be determined definitely and accurately whether a given use is a *public use* or *a mere private use.* The general rule gathered from all the decisions is that each case must be determined upon its own particular facts. It is also well established that a law providing for raising money by taxation will not be held to be unconstitutional unless it is palpably so.

It is, of course, elementary law that an Act of the law making power will not be held unconstitutional unless it is clearly and palpably so. All presumptions will be indulged in favor of the constitutionality of the given Act. In determining whether a legislative Act is or is not constitutional under the Fourteenth Amendment the

ırt will take a broad view of the situation pre-
nted, the evils against which the legislation is
med, the surrounding circumstances as present-
exisiting and the probable future requirements
the people affected. Upon this point the Su-
reme Court of Maine in

Laughlin vs Portland, III Me. 486—90 Atl. 318, said:

"The courts have never attempted to lay down with minute detail an inexerable rule distinguishing public from private purposes because it would be impossible to do so. *Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary. What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today..... On the other hand, what would not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now.*"

In the same case the court further said:

"In the case of Fuel *a practical difficulty is caused by the existence of monopolistic combinations. The mining, transportation and distribution of coal has, in the process of industrial development, fallen into the hands of these combinations to such an extent that the greater part of the supply is in the absolute control of the fuel companies, etc.*"

This language is peculiarly applicable to the
e at bar when we consider the agencies and
abinations that, for years have had, practical-
absolute control of the transportation, grading

selling and distribution of the farm products of North Dakota.

If the people of Maine, for the purpose of relieving themselves from the oppression of monopolistic combinations in the matter of coal, can lawfully establish and conduct coal yards with funds raised by taxation on what principle may not the farmers of North Dakota relieve themselves from the oppression of similar combinations in the matter of farm products in the same way?

The people of North Dakota, we submit, have the same right to be relieved from the intolerable monopolistic conditions that for many years have obtained with respect to the transportation, sale, grading and distribution of their products as the people of the city of Partland had to be relieved from the same conditions with respect to fuel. While the nature of the business is not the same the controlling principle is the same. In the case last cited the court further said:

> "The determination by the legislature that the use for which property is authorized to be taken is a public one, is, undoubtedly, subject to review by the court. But all reasonable presumptions are in favor of the validity of such determinations by the legislature and **the act must be regarded as valid** unless it can be clearly shown to be in conflict with the constitution."

In discussing this precise question this court in Jones vs Portland, 245, U. S. 217, said:

> "The act in question has the sanction of the legislative branch of the state government, the body primarily invested with the power to determine what laws are required in the pub-

lic interest. That the purpose is a public one has been determined upon full consideration by the Supreme Court of the state, upon the authority of the previous decision of that court.....The attitude of this court toward state legislation purporting to be passed in the public interest and use declared to be by the decision of the court of last resort of the state passing the act has often been declared. While the elementary authority to determine the validity of legislation under the fourteenth amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular city is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view a jugment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect."

The Supreme Court of the State of North Dakota sustained the legislation in question on the stinct ground that the use for which the funds question were to be raised was a public use. Green vs Frazier, 176 N. D. 11.

Appellants' counsel, in the course of their argunt, have indulged in repeated criticisms of this ision. These criticisms we will answer later in s brief.

"A decision of the highest court of a state declaring a use to be public in its nature will be accepted unless clearly not well founded." Union Lime Co. vs Chicago etc. Ry. Co., 223 U. S. 211.

To the same effect see also

Falbrook Irrigation vs. Bradley, 164 U. S. 112.

Clark vs Nash, 198 U. S. 361-369.

Strickley vs Hyland Boy Min. Co., 200 U. S. 527.
Offield vs N. Y. etc. Ry. Co., 203 U. S. 372-377.
Hairston vs Danville Etc. Ry.. Co., 208 U. S. 598-607.

In deciding the case of Jones vs Portland, supra, this court said:

> "The decision of the case turns upon the answer to the question whether the taxation is for a *public purpose*. It is well settled that moneys for other than *public purposes* cannot be raised by taxation, and that the exertion of the taxing power for merely *private purposes* is beyond the authority of the state."

And in support of what was said this court cited Citizens Sav. & L. Ass'n vs Topeka, 20 Wall. 655.

The "Topeka case" was in no sense an authority upon the facts in Jones vs Portland, supra.

For all the purposes of this case it may be conceded that a municipality has no lawful authority to exact money from its taxpayers for the purpose of turning it over to a private concern as a *bonus* or *gift* or *gratuity*, or to support a business owned and conducted entirely by *private enterprise*. Laws under which the property owners of a community may, by means of taxation, be required to pay money to be used for any such purposes are, we concede, unconstitutional under the Fourteenth Amendment. In the "Topeka case," supra, after reviewing the authorities, this court said:

> "We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a *public purpose*. It may not be easy to draw a line in all cases so as to decide what is public business in this sense and what is not."

The business involved in the "Topeka case" was purely *private business owned and conducted for profit, the profits inuring to the owners of the business and not to the public.* That case, therefore, is in no sense an authority upon the questions with which this court is now dealing.

Nearly all the numerous cases cited by appellants' counsel in their voluminous brief upon this branch of the case were cases in which was involved simply the right or power of municipalities to raise money by taxation to be paid over as a gift, bonus or gratuity to business enterprises of a *purely private* nature—enterprises in which the public had no direct interest.

In the "Topeka case," supra, the business to be supported or benefitted by public taxation was, as stated, *purely private business* carried on, not in the name nor for the benefit of the public generally, but for the individuals who owned and conducted the business.

When the cases are analyzed it will, we think, be found that this court has enjoined taxation, or the use of the public funds, under the provisions of the Fourteenth Amendment only where the funds were to be used not in the maintenance of a business carried on by the state or a municipality, but where the business in question was privately owned and carried on for the profit of the owners.

In the "Topeka case," supra, it was proposed to pay over to the owners of a private enterprise moneys derived from the sale of the municipal bonds in question. In other words, such moneys were to be given to a purely private enterprise as a bonus or gratuity. Clearly, cases of that nature

have no bearing upon the question with which this court is now dealing.

It is conceded, or at least the facts appearing in the record conclusively show, that the business in which the state proposes to engage is purely *state business* as distinguished from *private business; that the business is to be conducted by the state for the benefit of all the people in the state,* and that no individual is to have any interest in the business except the interest that he derives incidentally from being a citizen and taxpayer of the state.

If the business in question is privately owned and carried on solely for the profit of the individuals owning it it is, under all the authorities, *private business* even though the public derives, incidentally, benefits therefrom.

If on the other hand the business is *publicly owned* and carried on *for the benefit and welfare of all the people and is such a business as is calculated to promote the general welfare of the community it is public business even though the same kind of business is carried on by private enterprise,* and under all the authorities, it is not material that such *public business* is conducted in competition with privately owned business.

In Holton et al vs City of Camilla, 134 Ga. 560-68 S. E. 462, the court, in substance, said, that the furnishing of ice to the community was a public business and that the act was not in violation of the provisions of the state constitution that private property could not be taken without due process of law. See also to the same effect

Sun Printing etc. Assoc. vs N. Y. 40 N. Y. Supp. 607

in which the court said:

"In considering this question it must be premised that cities are not limited to providing for the *strict necessities* of their citizens. Under legislative authority, they may minister to their comfort, health, pleasure or education. They are not limited to policing the city, to paving its streets and providing it with light, water, sewer, docks and markets. They may also be required by the sovereign power to furnish their citizens with schools, hospitals, dispensaries, parks, libraries and museums, with zoological and botanical and other gardens. They may thus even gratify our ears with music and summer afternoons minister to our comfort by providing us with baths. Expenditures in all these transactions under legislative authority have never been disputed. Where, then, shall we draw the line? *It would be very simple to draw it at those purposes for which precedent in the past can be found and to exclude all others.* This test would be easy of application but would be essentially vicious and erroneous. *Growth and extension are as necessary in the domain of municipal action as in the domain of the law. New conditions constantly arise which confront the legislature with new problems.* As the structure of society grows more complex needs spring up which never existed before. These needs may be so general in their nature as to affect the whole country *or the whole state* or they may be local and confined to a single county or municipality. In any case it is the duty of that legislative body which has the power and jurisdiction to apply a remedy. To hold that the legislature of this state, acting as the *parens patriae* may employ for the relief or welfare of the inhabitants of the state only those methods and

agencies which have proved adequate in the past would be a narrow and dangerous interpretation to put upon a fundamental law. No such interpretation has thus far been placed upon the organic law by the courts of this state. Whenever a question has been considered it has been universally treated in the broadest spirit."

This decision was sustained by the Court of Appeals of New York. 152 N. Y. 257.

In 1913 the supreme court of the State of California in Egan vs City and County of San Francisco et al, 165 Cal. 576—133 Pac. 294, held that it was competent for the authorities of the city of San Francisco to establish, maintain and operate a theatre by general taxation for the convenience, education, amusement and recreation of the people. As will be seen, in discussing the question, the court said:

"In endeavoring to ascertain whether the arrangement here sought to be consummated (this arrangement was to lease the property of the city to a private company) is authorized, we need not consider, at any length, the contention of the appellant that the construction and conducting of an opera house is not, under any circumstances, a municipal function. Even without relying upon a specific provision of the San Francisco charter to be mentioned hereafter we should hesitate to say that the providing of a place for the production of musical performances was not within the proper scope of municipal activities *as now understood.* The trend of authority, in more recent years, has been in the direction of permitting municipalities wider range in undertaking and promoting the public welfare or enjoyment. Thus the appropriation of money for public concerts has been held to

be proper under the statute authorizing appropriations for armories for the soldiers and sailors and for other public purposes. (Hubbard vs Tauton, 140 Mass. 467—5 N. E. 148). So too the erection of an auditorium has been properly regarded as falling within the purposes for which a municipal corporation may provide by charter. (Denver vs Hallett, 34 Colo. 393—83 Pac. 1066). Similar views have been expressed in a case involving the levy of taxes for the purpose of building a hall to be used as a memorial to soldiers and sailors who served in the War of the Rebellion. (Kingham vs Brockton, 153 Mass. 255). Generally speaking, anything calculated to promote the education, recreation or pleasure of the public is to be included within the legitimate domain of public uses.

"Assuming then, that authority to erect and conduct an opera house may be conferred upon a city, the question whether a given municipality has that authority must be answered by a reference to the charter or law defining the powers of the particular municipality. The rule is elementary that municipal corporations have only the powers expressly conferred and such as are necessarily incident to those expressly granted, or essential to the declared objects and purposes of the corporation, etc."

If the establishment and maintenance of a heatre for the convenience, education, amusement and recreation of the people is a "public se" and the "general welfare" of the people is hereby promoted how much more so would be the stablishment of a half dozen flour mills properly ocated in the State of North Dakota and owned nd operated, not as private enterprises, but as ublic enterprises and for the benefit of all the eople of the state?

If the test is, "Will the *general public welfare* be promoted by the establishment and conduct of the given business," and under that test a theatre may be maintained at public expense and with funds raised by taxation there should, we think, be no question but that flour mills and elevators which are essential to the business and welfare of most of the people of North Dakota would also be *public business* and therefore maintainable by taxation.

We are aware that the supreme court of Ohio in State vs Lynch, 88 Ohio St. 71, held that a municipality has no right to tax its citizens to maintain a moving picture show. But in that case the court based its decision, not upon the Fourteenth Amendment to the Federal Constitution but upon the Constitution of the State of Ohio. And even in that case the decision was by a divided court.

We are also aware that in a number of cases the supreme court of Massachusetts held that a municipality had no right to use public funds to carry on a business such as is ordinarily carried on by private individuals and where it is not shown that there is a *pressing public necessity* for the municipality to engage in the particular business. But in those cases the action of the court was controlled by the provisions of the Massachusetts Constitution. We have read these decisions but we did not find that in any of them the decision was based on the Fourteenth Amendment to the Federal Constitution. And in this connection we may say that we need not spend time arguing that the action of the State of North Dakota or of its officials was in no wise controlled by the Constitu-

tion of Massachusetts or the Constitution of Ohio.

In the court below appellants' counsel cited the case of State vs Nelson County, 1 N. D. 88.

All that was decided in that case was that the county *could lawfully issue bonds to procure seed grain for needy farmers residing therein.* The legislation was sustained on the ground that it was a measure intended for the "necessary support of the poor." Discussing the question the court, among other things, said:

> "But where the legislature assumes, in the guise of taxation, to compel 'A' to advance his private means to aid 'B' in the prosecution of a *purely private enterprise,* the courts will not hesitate to perform the duty of declaring such tax void, etc."

Very clearly that decision is not applicable here. As will be seen, in support of its decision the court cited the "Topeka case," supra. It also cited Parkersburg vs Brown, 106 U. S. 487. That case, as will be seen, simply holds that the legislature of West Virginia could not authorize the City of Parkersburg to issue its bonds *for the purpose of lending the same to persons engaged in manufacturing.* The North Dakota court also cited Cole vs City of LaGrange, 113 U. S. 1. That case simply holds that,

> "The legislature of Missouri has no constitutional power to authorize the city to issue its bonds *by way of donation* to a private manufacturing corporation."

The North Dakota court in support of its decision also cited the case of Coates vs Campbell, 35 N. W. 366 (Minn.). In that case the supreme court of Minnesota simply held that,

> "An act authorizing the issue of bonds of a village corporation to aid in the construction of a dam for the purpose of improving a *private water power* is unconstitutional as providing for public taxation for a private use."

The North Dakota court also cited the case of Lowell vs Boston, 111 Mass. 454. In that case the Massachusetts court simply held that,

> "An act of the legislature of Massachusetts authorizing the city of Boston to issue bonds and lend the proceeds on mortgages to the owners of land, is unconstitutional."

The case of Lowell vs Boston, supra, has been frequently cited in support of the proposition that taxation cannot be resorted to for the purpose of raising money for a *purely private use.* As seen, in that case the money to be raised by taxation was to be loaned on mortgages *to the owners of the land in question.*

Appellants' counsel also cite the case of Dodge vs Mission Township, Shawnee County, Kansas, 107 Fed. 827. (8th circuit). That case must be considered in the light of its own facts. In the opinion, it is true, Judge Sanborn says:

> "The legislature cannot make a *private purpose* a *public purpose* or draw to itself or create the power to authorize a tax or a debt for such a purpose by its mere fiat."

The foregoing language of Judge Sanborn must be considered in the light of the facts with which the court was dealing. What were the facts? Briefly stated, Mission Township in Shawnee County, Kansas, under an Act of the Kansas legislature sought to aid, by taxation, a *private concern* engaged in the business of manufacturing

sorghum cane into sugar and syrup. In other words, the question was whether a municipality could raise money by taxation for the purpose of handing it over *as a subsidy* to the owners of a privately owned and conducted business. We have no quarrel with the Circuit Court of Appeals in that case. We have read all the decisions cited by the court in that case and we find that in all of them the business or enterprise to be aided by the funds sought to be raised by taxation was purely *private business,* business in which neither the state nor any municipality had any interest, or over which the state or any municipality had any control. In other words, in each of these cases the money sought to be raised by taxation was to be turned over to a private business concern as a bonus or gratuity. In

Munn et al vs Ill. et, 94 U. S. 113.
Budd vs N. Y., 143 U. S. 517.
Brass vs Stoeser, 153 U. S. 391

this court held that;

> "When private property is devoted to a public use, (such for instance as a grain elevator) *it is subject to public regulation.*"

It is upon the principle laid down in these cases that Congress or a state legislature may *regulate* the business of conducting elevators that are receiving and shipping grain for the public generally, or can regulate the business of common carriers which, in their nature, are quasi public corporations.

We do not, however, contend that those cases are controlling here as they go only to the power of the state or nation to regulate private business of a quasi public nature but do not deal with the

question of the power of a state *to establish and conduct* a business for the purpose of promoting the general welfare—a business which the state owns and conducts and in which private parties have no interest except the incidental interest which citizens of the state have in the carrying on of the particular business by the state.

Appellants' counsel cite Osborne vs the County of Adams, 106 U. S. 181. That case, like every other case, must be considered with reference to its own particular facts. That case dealt with an act of the Nebraska legislature, the purpose of which was to enable counties, cities and precincts to borrow money on their bonds or to issue bonds to aid in the construction or completion of works of internal improvement in the state and to legalize bonds already issued for that purpose. The purpose for which the money to be raised by the sale of the bonds was

> "To aid in the construction and completion and to furnish the motive power for a steam custom grist-mill."

This grist-mill was privately owned and the money to be furnished by the municipality was, in effect, to be given to a private concern owning and operating the grist-mill.

Clearly that case has no application to the facts in the case at bar. That case should have been read in connection with the case of Township vs Beasley, 94 U. S. 161. The facts in that case were that State of Kansas passed an Act authorizing towns and counties to issue bonds to aid in building bridges and to aid in the construction of railroads, water-power, "or other works of internal

mprovement." The state also passed another Act declaring all custom grist-mills to be "public nills" and regulated their management. Acting nder this legislation the township of Burlington n Coffey County, Kansas, issued certain of its onds, and in due course Beasley became the own- r thereof and the action was to recover on those onds; and the question involved was whether *the urpose* for which the bonds were sold was a *pub- ic purpose*, and, as will be seen, the court held with the plaintiff. Discussing that question, as will be seen, the court in that case (Twp. vs Beas- ley, 94 U. S. 161) said:

> "Under our recent decision in Munn vs Ill., 94 U. S. 113, and other cases upon kindred subjects it would be competent to the legislature of Kansas to regulate the toll to be taken at these mills. It is a reasonable construction of this statute to hold that aid to this mill is aid of a *public work* within its meaning, and that the construction and euipment of the steam grist-mill was *an internal improvement.*"
>
> "The case of Loan Asso. vs Topeka, 87 U. S. 460—20 Wall. 661, will judge these bonds to be legal. The point is there expressly made that bonds, when issued for a *public purpose*, a *public use*, which it is the right and the duty of the state government to assist are valid. The issue we are considering falls within this definition."

In our view this case is not entirely in harmony th other decisions of this court, but while it is ferred to in Osborne vs County of Adams, pra, it is not overruled. The case while not di- tly in point on the question involved in the case har is, nevertheless, instructive upon the ques-

tion as to what is and what is not a public use
a public purpose.

Undoubtedly the mills and elevators and othe
enterprises contemplated by the legislation in
volved in this litigation *will be under the direc
control and management of the state through it
officials and will be conducted for the genera
benefit of the people of the state.*

If, then, public funds may lawfully be appropri
ated to assist in the construction and maintenanc
of flour mills that are to be *privately owned* bu
subject to state control on what principle may no
public funds raised by taxation be lawfully use
to construct and operate flour mills *to be owne
and controlled by the state for the benefit of al
the people of the state?*

We respectfully submit that there is greate
reason to sustain the legislation involved in the
case at bar than there was to sustain the legisla
tion involved in the case of Twp. vs Beasley,
supra. And yet such legislation was sustained by
this court.

In Commonwealth vs Pittsburgh, 183 Pa. St.
202—63 A. S. R. 752, the court said:

> "A city has the right to appropriate money
> to a committee of citizens appointed by a
> chamber of commerce and ratified by the city
> authorities to defray the expenses of a survey
> for a ship canal and to secure information as
> to the benefit which would be derived by the
> city from the canal although the constitution
> forbids municipalities to appropriate money
> or loan their credit to any corporation, asso
> ciation, institution or individual."

Discussing the question as to whether the pur
poses for which the money was appropriated wa

a public or purely private purpose the court said:

> "In this case the city of Pittsburg does not propose to build the canal, or to loan or appropriate money for that purpose, or to join with any person, association, or corporation for that purpose. It simply appropriates the thousand dollars—a very small sum for the city in view of the great object aimed at—for surveys, getting information, etc., to ascertain whether a ship canal between Pittsburg and Lake Erie is practicable, and would be a benefit to the city.
>
> "That such a ship canal is practicable, and would be of very great benefit to the trade and industries of Pittsburg, must be taken as true, in this case, for the provisional committee so reported, and it is so stated in the ordinance of July 11, 1895, and is not controverted by the controller in his answers. There can be no doubt, if practicable, it would be of immense importance to Pittsburg to have a ship canal from here to Lake Erie."

If the city of Pittsburg could lawfully appropriate public funds for the purpose of inducing a private person or a private corporation to construct the canal in question we confess that we are unable to perceive on what principle the city could not construct the canal itself as a municipal enterprise.

It has been repeatedly decided by this court that the building of a railroad is a *public enterprise*, and because it is a public enterprise—because its construction will tend to promote the general public welfare—(unless prevented by state law or state constitution) municipalities may tax its property holders to raise funds to be appropriated in aid of the construction of railroads.

Washington Co. vs Williams, 111 Fed. 801;
Pine Grove Twp. vs Talcott, 19 Wall. 666-667.

In the case last cited Mr. Justice Swayne pointed out that legislation authorizing such donation had been sustained in nineteen out of twenty-one states.

Dillon on Municipal Corp. Vol. 2 (5th ed.) Sec. 884 et seq.

In the court below appellants' counsel cite and urged upon the attention of the trial judge the case of Covington vs Kentucky, 173 U. S. 237, in support of the contention that was there made and is made here that "public purposes" mean "governmental purposes."

We can read nothing of the kind from the decision in that case. The case came to this court on an appeal from the decision of the supreme court of Kentucky, and in deciding the case this court, among other things, said:

> "However much we may doubt the soundness of any interpretation of the state constitution implying that lands and buildings are not public property used for public purposes when owned and used under legislative authority by a municipal corporation, one of the instrumentalities or agencies of the State, for the purpose, and only for the purpose, of supplying that corporation and its people with water, and when the net revenue from such property must be applied in the improvement of public ways, we must assume, in conformity with the judgment of the highest court of Kentucky, that section 170 of the constitution of that Commonwealth cannot be construed as exempting the lands in question from taxation. In other words, we must assume that the phrase 'public purposes' in that section means 'governmental purposes', and that the

property here taxed is not held by the city of Covington for such purposes but only for the 'profit or convenience' of its inhabitants and is liable to taxation at the will of the legislature unless at the time of the adoption of the constitution of Kentucky it was exempt from taxation in virtue of some contract the obligation of which is protected by the Constitution of the United States.

"The fundamental question in the case then is whether at the time of the adoption of that constitution the city of Covington had, in respect of the lands in question, any contract with the State the obligation of which could not be impaired by any subsequent statute or by the present constitution of Kentucky adopted in 1891. If the exemption found in the act of 1886 was such a contract, then it could not be affected by that constitution any more than by a legislative enactment.

"We are of the opinion that the exemption from taxation embodied in that act did not tie the hands of the Commonwealth of Kentucky so that it could not, by legislation, withdraw such exemption and subject the property in question to taxation. The act of 1886 was passed subject to the provisions in a general statute of Kentucky, above referred to, that all statutes 'shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed.' If that act in any sense constituted a contract between the city and the Commonwealth, the reservation in an existing general statute of the right to amend or repeal it was itself a part of that contract."

As will be seen, this court disagreed with the preme court of Kentucky on the question as to ether the use to which the property in question s put was a public use but sustained the decion on the ground that the question of taxation

was one exclusively under the control of the state, and that when the act under which the property was acquired was passed the Constitution of Kentucky provided that all privileges and franchises granted by the state authority could be changed or repealed, and this court simply held that inasmuch as this constitutional provision was in force when the act authorizing the city to acquire the property in question was passed the subsequent constitutional provision did not "impair the obligation of any contract," and that the construction which the supreme court of Kentucky had placed on the constitution of that state was binding upon this court.

Taking the decision altogether it is in no sense an authority for the proposition that "public purposes" mean "governmental purposes."

In Walker vs City of Cincinnati, 21 Ohio St. 14, the supreme court of Ohio defined the term "public purposes" as follows:

> "As the terms are used in reference to taxation, what is for the 'public good,' and what are 'public purposes' and what does constitute a 'public purpose,' *are questions which the legislature must decide upon its own judgment*, and in respect to which it is vested with a large discretion which cannot be controlled by the courts, except, perhaps, where, under pretense of a lawful authority, it has assumed to exercise one that is unlawful. Where the power which is exercised is legislative in its character, the courts can enforce only those limitations which the Constitution imposes, and not those implied restrictions which, resting in theory only, the people have been satisfied to leave to the judgment, patriotism, and sense of their representatives."

In Jarrott vs Moberly, 13 Fed. Cas. 366-367, the court said:

> "Since it is law in Missouri that aid by the issuance of municipal bonds can be constitutionally given to railroad companies it would seem to follow that they might also be issued to secure the erection of the railroad and machine shops, and that such purposes would be 'public purposes' in such a sense as to justify compulsory taxation to pay the debt."

This case, to be sure, was decided in view of the constitution of Missouri, but the question of the validity of the constitution of Missouri, the same as the question of the validity of the statutes of Missouri, must be determined with reference, among other things, to the fourteenth amendment to the Federal Constitution. In Walker vs City of Cincinnati, supra, the court said:

> "Courts cannot say that a statute authorizing a city to borrow money, etc., for building a railroad to be owned by it, is not for a 'public purpose'."

Discussing the question of the constitutionality of an act "To provide for the organization and government of irrigation districts, etc.," the supreme court of California in Turlock Irrigation Dist. vs Williams, 18 Pac. 379 (Cal.) said:

> "The results to be derived from a drainage law, and one which has for its purpose the irrigation of immense bodies of arid lands, must necessarily be the same, as respects the public good. The one is intended to bring into cultivation and make productive a large acreage of land which would otherwise remain uncultivated, and unproductive of any advantage to the state, being useless, incapable of yielding any revenue of importance toward the support of the general purposes of

state government, by reason of too much water flowing over or standing upon or percolating through them. The other has for its main object the utilizing and improvement of vast tracts of arid and unfruitful soil,—desert-like in character, much of it,—which, if water in sufficient quantity can be conducted upon and applied to it, may be made to produce the same results as flow from the drainage of large bodies of swamp and overflowed lands. Such a general scheme, by which immigration may be stimulated, the taxable property of the state increased, the relative burdens of taxation upon the whole people decreased, and the comfort and advantage of many thriving communities subserved, *would seem to redound to the common advantage of all the people of the state, to a greater or less extent.* It is true that incidentally private persons and private property may be benefitted, but the main plan of the legislature, viz., the general welfare of the whole people, inseparably bound up with the interests of those living in sections which are dry and unproductive without irrigation, is plain to be seen pervading the whole of the act in question. *This is not a law passed to accomplish exclusive and selfish private gain. It is an extensive and far-reaching plan, by which the general public may be vastly benefitted; and the legislature acted with good judgment in enacting it.* 'If the use for which property is taken be to satisfy a great public want or public exigency, it is a public use within the meaning of the constitution, and the state is not limited to any given mode of applying that property to satisfy the want or meet the exigency'."

If funds may lawfully be raised by general taxation to finance an irrigation project for the purpose of increasing the value of arid lands and increasing the quantity of food products produced

we are unable to perceive why funds may not be raised in the same way to establish a business condition that will *increase the value of farm products after they are produced.* In principle there is no distinction between the two cases. It is our contention that *if the general welfare of the whole community* will thereby be promoted the state, in its sovereign capacity, may lawfully, by general taxation, raise and appropriate funds to accomplish either purpose.

If the state may lawfully appropriate public funds accumulated by taxation to carry out an irrigation project for the purpose of transforming desert lands into productive fields and thereby improve agricultural conditions why may not the state appropriate money accumulated in the same way to establish flour mills to the end that the grain grown in the state may be manufactured therein with the result that fertilizers will be created that will increase the fertility of the soil and thereby increase the production of grains and other agricultural products?

In the late case of Saunders et al vs Arlington et al, 147 Ga. 581—94 S. E. 1022 (decided in Jan., 1918), the supreme court of Georgia held that the charter of the town of Arlington confers on the authorities of the municipality the power to establish and maintain an "ice-plant" and "cold storage" within such municipality for the benefit of the inhabitants thereof, whenever they have complied with the preliminary steps for such purpose as provided by the constitution and laws of the state. In the earlier case of Holton vs Camilla, supra, as already shown, the supreme court of

Georgia had held that the village could lawfully engage in the business of maintaining a public ice plant. In the latter case the court said:

> "If establishing an ice plant by express authority is for the public good and can be upheld, we fail to see why the establishment and maintenance of an ice plant and cold storage system for the municipality is not conducive to the health, comfort, and convenience of the citizens, and a public improvement and for the benefit of the town; and why such improvements do not fall within the power conferred by the legislature in the above-quoted sections of the municipal charter now under review. We think such power is conferred by the legislature; and the matter is in the hands of the legal voters of the municipality as to whether they will exercise the power conferred on them and the municipality to issue bonds for the purpose of establishing the ice plant and cold-storage system."

In the case of Andrews vs City of South Haven, 187 Mich. 294—153 N. W. 827, the supreme court of Michigan decided that under the constitution and statutes of that state authorizing municipalities to acquire and operate gas and electric light plants a city which operated its own electric light plant was entitled to take on those things naturally connected with and belonging to the running of such a business and so might sell, if necessary, light fixtures. Discussing the question the court said:

> "The power to engage in this municipal business activity for the public welfare is necessarily conferred in general terms. To go into details of administration and specify each particular thing which could or could not be done would be unwise and practically impossible. As to details and methods of con-

ducting such authorized business, involving exercise of special knowledge and business judgment, there must be implied powers. A strict, illiberal, or narrow construction which might hamper the exercise of a reasonable discretion by the municipal authorities in such matters, because the power is given in few words, is not, with perhaps a few exceptions, the tendency of decisions in most jurisdictions. The courts as a rule are not disposed to interfere with the management of an authorized business, conducted by the municipal authorities presumably in the interest and for the benefit of the city and its inhabitants, unless dishonesty or fraud is manifest or the vested power which is implied has been clearly exceeded or grossly abused."

It must be conceded that the business of selling "light fixtures" is one that has heretofore commonly been carried on by private enterprise; and we must, we think, assume that individuals and private business corporations are now extensively engaged in that business. If a municipality can lawfully engage in the business of maintaining an ice-plant and a cold-storage system and may also engage in the business of selling light fixtures we can see no reason why the State of North Dakota cannot lawfully engage in the business of operating a flour mill or a grain elevator. If in the former cases the expenditure of the public funds is for a "public purpose" we can perceive no reason why the expenditure of the public funds in the latter case is not also for a public purpose.

The constitution of South Dakota contains a provision, Article 3, Section 1, as follows:

"Neither the state nor any county nor municipality shall loan its credit, make donations in aid of individual corporations or be-

come the owner of the capital stock of a
such corporation, nor shall the state enga
in any work of internal improvement."

In 1917 the legislature of South Dakota pass
an Act authorizing cities to acquire, constru
equip and operate telephone systems. In the ca
of Spangler vs City of Mitchell, 35 S. D. 335—1
N. W. 339, the question as to whether under t
constitution and statutes above referred to
municipality in South Dakota could lawfully e
gage in the business of constructing and mai
taining a telephone system was discussed, and
a very able opinion the court decided that t
municipality had lawful authority to constru
and maintain the telephone system and to use t
funds of the state raised by taxation for that pu
post. It does not appear that the case was deci
ed with reference to the effect of the Fourteen
Amendment to the Federal Constitution. Ho
ever, we are not at liberty to assume that a case
so much importance was decided without refe
ence to that amendment. If the appellees can
enjoined from constructing and operating flo
mills in North Dakota under the provisions of t
Fourteenth Amendment it would seem that
municipality in South Dakota could be enjoine
from constructing and operating a telephone sy
tem at public expense.

Constructing and maintaining telephone sy
tems is a business that is ordinarily carried on
private enterprise. The business of conductin
telephone systems employs thousands of men an
millions of dollars of capital. As stated, the bus
ness is ordinarily carried on by private ente

prise. The business is in no sense "governmental" in the restricted sense of that term.

In Union Ice & Coal Co. vs Town of Ruston, 135 La. 898—66 So. 262, the supreme court of Louisiana held that a municipality in that state could not lawfully engage in the business of manufacturing and selling ice. That decision, however, was based upon the peculiar wording of the Louisiana constitution. That constitution provides, in substance, that the taxing power could be exercised by the general assembly

> " * * * For state purposes and by parishes and municipal corporations and public boards under authority delegated by the general assembly for parish, municipal and local purposes *strictly* public in their nature."

The supreme court of Louisiana held that by the use of the word "strictly" the constitution makers had clearly manifested an intention to confine the activities of municipalities within the narrow limits in which they had been theretofore confined in that state.

That case is in no sense an authority in support of the contention that under the Fourteenth Amendment to the Federal Constitution a state or municipality within the state cannot engage in business which heretofore has ordinarily been carried on by private enterprise.

As stated, nearly all the decisions cited by appellants' counsel in their extended brief were cases in which the states or municipalities involved attempted to raise money by general taxation for the purpose of turning the same over to some privately owned and privately conducted business

enterprise. Manifestly those cases have no appli cation to the questions with which we are dealing in the case at bar.

It is conceded that the elevators and flour mill contemplated by the legislation in question are t be owned and operated by the state for the bene fit of all the people in the state and that no privat individual, company or corporation is to receiv any benefit from the business except such inci dental benefit as may accrue to them by their be ing residents within the state. That clear distinc tion between the "Topeka case" and other similar cases and the case at bar should be kept clearly and steadily in mind.

JUDICIAL NOTICE.

In the opinion filed by the learned trial Judge (Tr. p. 80 fo. 111 et seq.) reference is made to the conditions existing in North Dakota with respect to the production, transportation, grading, mar keting and distribution of the farm products of the state.

Throughout their extended brief appellants' counsel make frequent complaint that in the deci sion of the case the trial court took judicial notice of existing conditions, and they contend that, t some extent at least, the decision was based there on. We respectfully submit that these complaint are without merit.

Under section 7938 North Dakota Code 1913 the courts will take judicial notice of the followin subjects:

Sub. div. 7. Of the course of the seasons and o husbandry.

Sub. div. 8. Of the succession of the seasons as in relation to vegetables and animals, and the general course of agricultural crops, matured so as to be severed.

Sub. div. 9. Of what places are great marts of trade, such as New York, Chicago and St. Louis.

Sub. div. 10. Of the distance between well known places in the United States and the ordinary time of railroad trains.

Sub. div. 12. That there are facilities for business, by railroad, telegraph and telephone, between two certain places.

Sub. div. 29. Of the universal usage of merchants and ordinarily of a common law custom.

Sub. div. 30. *Of whatever ought to be generally known within the limits of the court's jurisdiction.*

Sub. div. 32. Of transactions and objects which form a part of the history and geography of the country.

Sub. div. 33. Of matters of public history affecting the whole people.

Sub. div. 35. Of the history of a country, its topography and general condition.

Sub. div. 36. Of the boundaries of the state and the navigability of its large rivers.

Sub. div. 39. Of what is commonly known in the various manufactures and industries.

Sub. div. 40. Of a manufactured article which has for many years been in common use throughout the country.

Sub. div. 53. Of the custom of mutual credits in business houses.

Sub. div. 57. Of the legislative journals and the modes by which domestic laws are authenticated.

Sub. div. 58. Of the statute books and journals of the houses of the legislature.

Sub. div. 59. Of the journal of each branch of the general assembly.

Sub. div. 60. *Of such contemporaneous history as led up to and probably induced the passage of a law.*

Sub. div. 61. Of the history of every statute in its progress through the legislature.

Sub. div. 62. Of the true reading of a statute by referring to the original act on file in the office of the secretary of state.

Sub. div. 68. Of such matters of common knowledge and science as may be known to all men of ordinary understanding and intelligence.

Sub. div. 76. Of the laws of nature, the measure of time and the geographical divisions and political history of the world.

> "The general rule is that matters of history, if sufficiently notorious to be subject to general knowledge, will be judicially noticed. The reason for this recognition has been said to be that the facts of history enter into the construction of the laws, and so must be in the knowledge of the court whose duty it is to construe them. Naturally common knowledge is more detailed in regard to the history of things close at hand than of things remote, so it may safely be said that matters of public history concerning the United States or the particular state where the court has jurisdiction, and affecting the whole people, will always be judicially noticed."
>
> Ruling Case Law Vol. 15, p. 1088 et seq.
> See also numerous cases cited in note 14 on

page 1089.

See also extended note to Green vs Lineville Drug Co., 124 Am. St. R. sub. div. "C", p. 24; sub. div. "F", p. 30; sub. div. "H", p. 32; sub. div. "I", p. 35; sub. div. "R", p. 52; sub. div. "S", p. 54.

All the facts referred to by the learned trial udge in his opinion were facts within the com-ion knowledge of the people of North Dakota. 'hey were all matters concerning which the peo-le had for years taken a deep interest. They ere facts and conditions upon which a great olitical party was founded—a party that has con-rolled the political affairs of the state for more han three years. It would be idle, therefore, to ontend that the facts referred to were not all ithin the common knowledge of the people of the tate. *They were all matters of contemporaneous istory and led up to and induced the passage of he laws and the adoption of the constitutional rovisions involved in this litigation.* It was herefore the duty of the trial court to take judi-ial notice of these facts and conditions. It has requently been said that "A judge should not retend to be more ignorant than the average an." A judge should not close his eyes to what ll the rest of the world can plainly see. It was roper for the trial court to take judicial notice of he efforts that in years past had been put forth y the people of North Dakota to secure more just nd equitable conditions in the transportation, rading, marketing and distribution of their roducts. These were all historical facts, so far t least as the State of North Dakota was concern-d. They constituted "The contemporaneous his-

tory that led up to and induced the passage of the laws."

It is noticeable that appellants' counsel nowhere claim that the facts and conditions recited in the opinion of the learned trial Judge were not all true. They simply contend that they were not such facts and conditions as the court could know judicially. This contention, we believe, is not sustained by the common law or by the statute law of North Dakota.

CONDITIONS IN NORTH DAKOTA THAT BROUGHT ABOUT THE LEGISLATION INVOLVED.

As will be seen, reviewing the historical aspect of the case the learned trial court (Tr. p. 80, fo. 111 et seq.) said:

> "The people of North Dakota are farmers, many of them pioneers. Their life has been intensely individual. They have never been combined in corporate or other business organizations to train them in their common interests or promote their general welfare. In the main they have made their purchases and sold their products as individuals. Nearly all their livestock and grain is shipped to terminal markets at St. Paul, Minneapolis and Duluth. There these products pass into the hands of large commission houses, elevator and milling companies and livestock concerns. These interests are combined not only in corporations, chambers of commerce, boards of trade and interlocking directorates but in the millions of understandings which arise among men having common interests and living through long terms of years in the daily intercourse of great cities. These common understandings need not be embodied in articles of incorporation or trust agreements. They may be as intangible as the ancient 'powers of the air'. But they are as potent in

the economic world as those ancient powers were thought to be in the affairs of men. It is the potency of this unity of life of men dwelling together in daily intercourse that has caused all nations thus far to be governed by cities.

"As North Dakota has become more thickly settled and the means of intercourse have increased the evils of the existing marketing system have been better understood. No single factor has contributed as much to that result as the scientific investigations of the state's Agricultural College and the federal experts connected with that institution. That work has been going on for a generation and has been carried to the homes of the state by extension workers, the press and the political discussion of repeated political campaigns. The people have thus come to believe that the evils of the existing system consist not merely in the grading of grain, its weighing, its dockage, the price paid and the disparity between the price of different grades and the flour producing capacity of the grain. They believe that the evil goes deeper; that the whole system of shipping the raw materials of North Dakota to these foreign terminals is wasteful and hostile to the best interests of the state. They say in substance:

"1. The raw materials of the state ought to be manufactured into commercial products within the state. In no other way can its industrial life be sufficiently diversified to attain a healthy economic development.

"2. The present system prevents diversified farming. The only way that can be built up is to grind the grain in the state which the state produces—keep the by-products of bran and shorts here and feed them to livestock upon the farms of the state. In no other way can a prosperous livestock, dairy and poultry industry be built up.

"3. The existing marketing system tends directly to the exhaustion of soil fertility. In no way can soil depletion be prevented except to feed out to livestock at least as much of the by-products of the grain raised upon the ground and thus put back into the soil in the ground and thus put bacsk into the soil in the form of enriched manures, the elements which the raising of small grains takes from it.

"The present movement began at least as far back as 1911. In that year an amendment of the State Constitution was initiated authorizing the state to acquire one or more terminal grain elevators and maintain and operate the same in such manner as the legislative assembly should prescribe. That amendment was adopted in 1913. From that time forward the subject of marketing the products of the state has been the main theme of public thought. The movement has gone straight forward, the constitution has been repeatedly amended including the amendments here assailed—all having for their object the correction of the existing system of marketing the state's products. Year by year the conviction has deepened, in steadily increasing majorities, that public ownership of terminal elevators, mills and packing houses is the only effective remedy to correct the evils from which they believe themselves to be suffering. *Their decision is not a popular whim but a deliberate conviction arrived at as a result of full discussion and repeated presentations of the subject at the polls. The acts which the court is asked to restrain are not those of public officials, who are pursuing enterprises of their own devising. Those acts express not simply the judgment of the state legislature. To authorize their enactment the people of the state have re-drawn their Constitution. That is the highest and most deliberate act of a free people. These constitutional amendments authorize and direct the*

state to do what the defendants are threatening to do. Their acts are simply the carrying out of the mandate of those constitutional amendments.

"It is hopeless to expect a population consiting of farmers scattered over a vast territory as the people of this state are to create any private business system that will change the system now existing. The only means through which the people of the state have had joint action is their state government. If they may not use that as the common agency through which to combine their capital and carry on such basic industries as elevators, mills and packing houses and so fit their products for market and market the same they must continue to deal as individuals with the vast combinations of these terminal cities and suffer the injustices that always exist where economic units so different in power have to deal the one with the other.

"The foregoing is what a majority of the people of the state have been persuaded to believe by those whose leadership they trust. Whether their grievances are real or fancied, whether their remedies are wise or foolish, are subjects about which the court is not concerned. The only object in trying to set them forth has been to place the constitutional amendments and laws here assailed in their true relationship to the life and thought of the people by whom they were adopted."

It is a matter of common knowledge that North Dakota is essentially an agricultural state. We have no forests, and therefore no lumber industries. Aside from lignite coal we have no mining industry. We have no commerce except commerce in agricultural products. Our manufacturing industries are negligible. Substantially every dollar that comes into the state of North Dakota

comes from the sale of agricultural products. In a very literal sense the whole population of North Dakota lives on agriculture.

From the earliest settlement of the state the grain growers and stock raisers of North Dakota have been convinced that in carrying on their business they were not getting a square deal, and every well informed man in the state knows that there was justice in that complaint. In transporting, marketing and distributing the products of the farms of North Dakota there have been too many middlemen between the producer and the consumer—too many men have stood in the currents and gathered toll from products which they did nothing to create; and the result has been that while the consumer has paid exorbitant prices for these products there has been very little left for the producer.

Furthermore it is a fact well established by experience and scientific investigation that to be profitable in the long run stock raising and grain growing must be conducted together. There must be grain to fatten the stock and there must be stock to enrich the land or in the end the fertility of the soil will be gone. Under the present system of distribution less than five per cent of the wheat raised in North Dakota is manufactured in the state; the balance is shipped in bulk to St. Paul, Minneapolis, Duluth, Milwaukee and other grain terminals. As a result the farmer is required to pay freight on the dockage and also on the by-products, to-wit, bran and shorts. The by-products are then either lost to the North Dakota farmer or he is required to pay the transportation

charges on returning it to the state. The only possible way of alleviating this condition is the establishment of flour mills within the State of North Dakota. And after an experience of nearly forty years it is found that private enterprise will not establish flour mills in North Dakota in sufficient numbers to grind the grain grown in the state; and therefore, the only alternative that the North Dakota farmer has is either to continue the old system or to have flour mills constructed and operated by the state.

As the grain business is now organized and conducted there is no possible relief to the farmer from the present situation of affairs and such a situation is intolerable. It spells eventual ruin to the North Dakota farmer. The program outlined in the legislation in question was designed to relieve not only the farmers of North Dakota but the people of North Dakota as a whole from this ruinous situation. If all this is true then the establishment of flour mills and grain elevators in the State of North Dakota and the manufacturing in the State of the grain grown therein has a direct and vital bearing on the welfare and prosperity of the people of the state.

If the test as to whether a business is *public* is, does or will the business promote the general welfare, there can then, we think, be no question but that the business in which the State of North Dakota proposes to engage under the legislation in question is public business.

As shown in the numerous authorities cited, the fact that a given business is one that has heretofore been generally carried on by private enter-

prise is not controlling on the question as to whether the business is public or private. The business of conducting cold-storage plants is usually carried on by private individuals. There are probably not to exceed a dozen fuel yards in the United States conducted by municipalities, but in thousands of towns, villages and cities there are to be found coal and wood yards carried on by private enterprise. Hundreds of thousands of men and hundreds of millions of capital are now and for years have been engaged in the production, distribution and marketing of coal. For more than a century the coal business has been carried on almost exclusively by private enterprise and yet this court squarely held in Jones vs Portland, supra, that the City of Portland had the lawful right to use funds raised by taxation for the purpose of establishing and conducting the business of buying and selling coal.

In McCulloch vs Maryland, 4 Wheaton 316–428, Marshall, Chief Justice, said:

> "The only security against the abuse of the power of taxation is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation. The people of a state, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of the government cannot be limited, they prescribe no limits to the exercise of the right, resting confidently on the interests of the legislature, and on the influence of the constituents over their representatives to guard them against its abuse."

Jones vs City of Portland, supra, sustaining a statute of the State of Maine authorizing cities to

establish and maintai wood, coal and fuel yards by funds raised by taxation is, so far as we have been able to discover, the latest expression of the supreme court on the question as to the power of states to engage or authorize their municipalities to engage in business of a *public nature* but which business has heretofore usually been carried on by private enterprise; and as will be seen, in that case this court squarely held that statutes authorizing the expenditure of public funds raised by taxation to establish and carry on such business are not unconstitutional under the Fourteenth Amendment to the Federal Constitution.

WHETHER LAWS ARE WISE AND EXPEDIENT IS A POLITICAL AND NOT A JUDICIAL QUESTION.

In discussing this question counsel (Appellants' Brief p. 99) say:

> " * * * we say that today in these days when the power of the state is pressed to such an extent and when the urgency of so-called public purposes rest as a constant menace upon the sacredness of private property, no duty is more imperative than that of the strict enforcement of these constitutional provisions intended to protect every man in the possession of his own.
>
> "Political disturbances and emotional action on the part of the people is very apt to bring about radical legislation accompanied by lax construction of what is a public purpose. Therefore, the question is one that should be determined by this court upon its own investigation and according to its own judgment upon the record as presented."

Further discussing the question (Appellants' Brief p. 94) counsel say:

> "We submit, however, that while the utterances of these courts are entitled to, and will,

> receive proper consideration at the hands o this court, yet the question of public use i one that is squarely before this court an must be passed upon according to the fact presented and not according to the view expressed by either the trial judge or th judges of the State Supreme Court whic may have been colored by the particula brand of political economy upon which thes acts are grounded."

Further on the same subject (Appellants' brie p. 95) counsel say:

> "That amendment (the fourteenth amend ment) simply protected the citizen by a fed eral constitutional enactment against enthusi astic legislation on the part of the state an enabled the citizen to invoke the Federal Con stitution for protection when private right were invaded or threatened by legislation, th result of the *vagaries of sociological dream ers.*
>
> "If, in determining the right of the citizen the act of the state legislature, or the decision of the state supreme court is to govern, then the 14th amendment becomes innocuous, and is but a 'scrap of paper'."

It is doubtless true that a small minority of the people of North Dakota conscientiously believe that the legislation involved in this litigation represents the "vagaries of sociological dreamers." A great majority of the people of the state, however, as shown by their political actions during the past four years, just as conscientiously believe that the legislation involved is wise and expedient and that under its operation the welfare and prosperity of the people of the state will be greatly promoted.

But whether this legislation is wise and expedient or the reverse is a political and not a judicial question. Courts do not concern themselves with

the policy of legislation or its economic wisdom or folly. Those are considerations belonging exclusively to the legislature.

C. B. & Q. Ry. Co. vs McGuire, 219 U. S. 549-569;
Price vs Illinois, 238 U. S. 446, 451, 452;
Rast vs Van Deman & Lewis, 240 U. S. 342-357;
Merrick vs Halsey, 242 U. S. 568, 586, 588.

In the case at bar we are dealing exclusively with the question of the power of the state in its sovereign capacity, and the power of the legislature of the state, as controlled by the Fourteenth Amendment to the Federal Constitution.

A large majority of the people of North Dakota upon full discussion and mature deliberation, to remedy conditions which had become intolerable, amended their constitution and enacted the legislation in question, and now the question as to whether these constitutional provisions and statutes are void as being in conflict with the Fourteenth Amendment to the Federal Constitution is squarely presented to the supreme court.

THE MOTIVES THAT PROMPTED THE LEGISLATION IN QUESTION.

In their otherwise very able brief appellants' counsel indulge in numerous insinuations against the good faith and integrity of those responsible for the constitutional provisions and statutes involved in this litigation; they also by insinuations, thinly disguised, challenge the motives of the judges of the supreme court of North Dakota. Perhaps on the whole this is not surprising. We all know that it is hard for men to see merit in legislation which they have strenuously opposed;

and too often attorneys who have been beaten attempt to console themselves by raising doubts as to the purity of the motives of the judges. We regret that counsel should have marred their very able and admirable brief by including in it these insinuations.

However, as was said by this court in the late case of Hamilton vs Kentucky Distilleries & Warehouse Co. decided on the 15th day of December, 1919, and reported in advance opinions of the supreme court of date January 5, 1920.

> "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute inquire into the motives of Congress. * * * Nor may it pass upon the necessity for the exercise of a power possessed, since the possible abuse of a power is not an argument against its existence."

See also numerous cases cited in the opinion referred to above.

IN WHAT KINDS OF BUSINESS MAY STATES AND MUNICIPALITIES LAWFULLY ENGAGE?

Upon this subject appellants' counsel in their brief (p. 160) say:

> "Light, Heat, Water, Drainage, Irrigation, Sewerage, Cemeteries, Parks and Recreational places, each and every activity furnishing something to the people that promoted general welfare and for some reason could be much better furnished by the government than by private enterprise."

Why stop with this list? Apparently counsel forget that substantially the same argument that is being made against the validity of the legislation in question in the case at bar was made to the

legislation authorizing states and municipalities to engage in each of the particular lines of business enumerated above. Every attempt on the part of the public acting collectively to engage in any line of business has been met by the same argument. The same argument was made when cities first attempted to establish city owned lighting plants, and the same with respect to city owned water works, and city owned heating plants, and drainage and irrigation projects carried on by the public. The judicial history of this country shows that every attempt on the part of the public to act collectively, either as states or cities or other municipalities, in the establishment of any line of business or work has been strenuously and persistently opposed, and opposed by those whose interest it was to preserve the existing order of things and the existing methods of transacting the given business. On this point counsel (Appellants' brief p. 160) further say:

> "It is frequently urged by those who are advocating enlarged powers of government, that times have changed, and that governmental functions are not today what they were a few years ago. That the principles governing the rights of governments in dealing with the citizen have been enlarged in their scope."

Appellants' counsel, as will be seen, then proceed to deny the correctness of the foregoing proposition. We respectfully submit that the political and judicial history of the United States plainly shows that in their denial counsel are mistaken. The true rule was aptly stated by the

supreme court of Maine in Laughlin vs Portland supra, as follows:

> "The courts have never attempted to lay down with minute detail an inexorable rule distinguishing public from private purposes because it would be impossible to do so. *Times change. The wants and necessities of the people change. The opportunity to satisfy those wants and necessities by individual effort may vary.* What was clearly a public use a century ago may, because of changed conditions, have ceased to be such today. * * * On the other hand, what would not be deemed a public use a century ago, may, because of changed economic and industrial conditions, be such today. Laws which were entirely adequate to secure public welfare then may be inadequate to accomplish the same results now."

The foregoing was substantially approved by this court in Jones vs Portland, supra.

There was a time when the education of the people was purely a private affair, each person educating his own children. And the first efforts to establish a system of public schools supported by taxation was met by the argument that a law that compelled one man to contribute to the education of the children of another man was unconstitutional and void under both the fifth and fourteenth amendments to the Federal Constitution. And, as stated, substantially this same argument has been made in opposition to every effort on the part of the people to act collectively in carrying on any business enterprise, and this regardless of the conditions in which the people are placed. The same battle was fought when cities attempted to construct and operate street railway systems,

lighting systems and heating systems and when states and counties undertook to construct drainage systems or undertook to establish irrigation systems. In fact every effort made by a municipality or a state to carry on any business that had up to that time been carried on by private enterprise was opposed, and generally opposed by those who had profited by conditions as then existing. Fortunately, however, all these attempts to prevent progress have failed. After diligent search we have found no decision of the supreme court holding that any business enterprise carried on by a state in its sovereign capacity for the benefit of its people and owned and controlled by the state was being carried on in violation of any provision of the Constitution of the United States.

MAGNITUDE OF THE BUSINESS INVOLVED.

An argument against the validity of the legislation in question is sought to be founded upon the *magnitude* of the business contemplated. The court is reminded that under the legislation involved it is the purpose of the State of North Dakota by means of funds raised by taxation to engage in the mill business, the elevator business and banking business. As matter of fact the purpose of engaging in these various lines of business is to accomplish a single purpose, namely, improving the agricultural conditions in the state. Each of these various lines of business is related to the others and they are all essential to the carrying out of the general purpose of the legislation. The elevators are to be operated so as to prevent private interests securing a monopoly of the grain business, and thus being able to control the prices

and the conditions of its sale and transportation. The flour mill business is for the purpose of having the grain raised in the State of North Dakota manufactured into flour within the state and thus preserving within the state the by-products. The bank was created for the purpose of enabling the state to finance these various lines of business.

But manifestly it is the nature of the business and the purpose sought to be accomplished by it and its relation to the people and not its magnitude that determine whether it is public business or private business, and therefore whether it can lawfully be carried on by the state or by a municipality within the state.

THE CASE OF GREEN ET AL VS FRAZIER ET AL, 176 N. W. DECIDED JANUARY 2, 1920.

In their brief frequent references of an uncomplimentary nature are made by appellants' counsel to this case. The Attorney General's relations to that action are and have been exactly the same as his relations to the case at bar. The case at bar, as has been seen, was commenced in the United States District Court of the District of North Dakota. The questions of law were raised by answer and motion to dismiss. The suit was brought by taxpayers of the State of North Dakota. In form the case at bar is an ordinary taxpayers suit to enjoin public officials from paying out the public funds and from collecting taxes provided for by the legislation in question. The case of Green vs Frazier is of exactly the same nature.

The case of Green et al vs Frazier et al was instituted in the state court. The plaintiffs are resi-

dents and taxpayers of the state and the relief sought is substantially the same as that sought in the case at bar. Following the established procedure the Attorney General interposed a demurrer to the complaint. This demurrer was brought on for argument in the regular way and was argued by the Attorney General. The demurrer was sustained. The plaintiffs promptly appealed from the judgment of dismissal to the supreme court of the state. In view of the public importance of the litigation and on application of the plaintiffs the argument in the supreme court was advanced, exactly as the argument of the case at bar was advanced by the supreme court of the United States. On the argument in the supreme court of the state the defendants were represented by the Attorney General. Later and in due course the case was decided by the supreme court of the state.

Appellants' counsel attempt to cast suspicion upon this decision of the supreme court of North Dakota and to minimize its effect by insinuating that it was a "friendly case"—in other words that the case was not brought in good faith and that the supreme court was in some way culpable in not refusing to take jurisdiction and in not refusing to render a decision.

It may be that the plaintiffs in the case at bar had some preference right to represent the body of the taxpayers of the state in contesting the validity of the constitutional provisions and statutes involved in the litigation, but we confess we are at a loss to know where or how they acquired

any such right. We know of no reason why th plaintiffs in the case of Green vs Frazier did no have the same legal and moral right to institut and prosecute their action that the plaintiffs i the case at bar had to institute and prosecut their action.

Inasmuch as the Fourteenth Amendment to th Federal Constitution is involved and that, there fore, the supreme court is the court of last reso it was perhaps not important whether the litiga tion was initiated in the federal court or in th state court; but, as it seems to us, the orderly pro cedure would have been to initiate the litigation i the state court so that when the matter came be fore the supreme court that court would have th benefit of the decision of the court of last resort o the state by which the legislation in question wa enacted and in which the laws called in questio were to operate.

To us, at least, it would seem altogether fitting that before this court was asked to decide the questions as to whether the business contemplated by the legislation involved was public or private, and whether those laws were necessary in the pub- lic interest, and whether in their operation they would promote the general public welfare the judgment of the judges of the supreme court of North Dakota as to the conditions existing in the State of North Dakota should first have been ob- tained and presented to this court.

In Jones vs Portland, supra, (p. 255) this court said:

> "While the ultimate authority to determine the validity of legislation under the 14th

> Amendment is rested in this court, local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information. In that view the judgment of the highest court of the state upon what should be deemed a public use in a particular state is entitled to the highest respect."

It is not our understanding that appellants' counsel intended to charge collusion between the Attorney General and the plaintiffs in Green vs Frazier. Their complaint seems to be that the supreme court of the state consented to hear and decide that case. We respectfully submit that the case came to the supreme court of North Dakota in the regular way; it was a case of great public importance and we cannot see that because other parties had instituted another action in the federal court was any good reason why the supreme court of North Dakota should have refused to hear and determine the case. Had the decision of the state court sustained the views of appellants' distinguished counsel we are, we think, safe in saying that no criticism of that court would have been found in counsel's brief.

Must we conclude, then, that it is because this court *will* give due weight to the decision of the supreme court of North Dakota upon the questions here involved that appellants' counsel pretend to see something suspicious in the circumstance that the supreme court of North Dakota heard and decided the case of Green vs Frazier?

For the reasons stated we contend that the decree should be affirmed.

Respectfully submitted,

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Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 508.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, ET AL.,
Appellants,

vs.

LYNN J. FRAZIER, ET AL.,
Defendants.

Brief on Behalf of Defendants, Lynn Frazier, Governor; John A. Hagan, Commissioner of Agriculture and Labor; and The Industrial Commission of North Dakota.

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Supreme Court of the United States.

IN EQUITY, No. 508.

OCTOBER TERM, 1919.

JOHN W. SCOTT, WILLIAM J. HOWE, O. B. SEVERSON, L. A. WOOD, NELS NICHOLS, GEORGE SIDELER, EMIL SCOW, W. C. MARTIN, HENRY MCLEAN, GEORGE P. HOMNES, B. W. HERSEY, T. W. BAKER, GEORGE CHRISTENSON, R. H. LEVITT, E. J. MCGRATH, E. A. ANDERSON, T. B. OAKLEY, O. F. BRYANT, GEORGE D. ELLIOTT, JOHN SATTERLUND, P. S. CHAFFEE, ALFRED THURING, J. S. GARNETT, J. E. BAKER, JOHN R. EARLY, B. C. JOHNSON, JOHN C. LEACH, FRED STECKNER, FRED L. ROQUETTE, IVER K. BAKKEN, MICHAEL TOAY, J. L. HARVEY, WILLIAM BURNETT, NATHAN UPHAM, ORLANDO BROWN, J. O. HANCHETT, W. W. WILDE, ARLO ANDREWS, DUNCAN BROWNLEE, W. W. COFFEL, E. B. ROSCOE, C. H. KINNEY, ON BEHALF OF THEMSELVES, AND ALL OTHER TAXPAYERS OF THE STATE OF NORTH DAKOTA,

Appellants,

vs.

LYNN J. FRAZIER, WILLIAM LANGER AND JOHN N. HAGAN, ACTING AND PRETENDING TO ACT AS THE INDUSTRIAL COMMISSION OF NORTH DAKOTA; LYNN J. FRAZIER, CARL KOZITSKY, WILLIAM LANGER, OBERT OLSON, AND THOMAS HALL, ACTING AS THE STATE AUDITING BOARD, LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY AND MINNIE J. NIELSON, CONSTITUTING AND ACTING AS THE BOARD OF UNIVERSITY AND SCHOOL LANDS; OBERT OLSON AS STATE TREASURER OF THE STATE OF NORTH DAKOTA; CARL KOZITSKY AS STATE AUDITOR OF THE STATE OF NORTH DAKOTA; AND LYNN J. FRAZIER, AS GOVERNOR OF SAID STATE; WILLIAM LANGER AS ATTY. GEN. OF SAID STATE, JOHN N. HAGAN, AS COMMISSIONER OF AGRICULTURE AND LABOR OF SAID STATE, THOMAS HALL AS SECRETARY OF STATE OF SAID STATE; AND MINNIE J. NIELSON AS SUPERINTENDENT OF PUBLIC INSTRUCTION OF SAID STATE; AND LYNN J. FRAZIER, WILLIAM LANGER, THOMAS HALL, CARL KOZITSKY, OBERT OLSON, JOHN N. HAGAN, AND MINNIE J. NIELSON, INDIVIDUALLY,

Defendants.

f on Behalf of Defendants, Lynn Frazier, Governor; John N. Hagan, Commissioner of Agriculture and Labor; and The Industrial Commission of North Dakota.

Statement

he appellants ask the Federal Government to obstruct
blic policy of North Dakota.

he public policy of North Dakota thus attacked is declared
s constitution as expressed in Section 185, Article 12 there-
as amended by Article 18, (Transcript page 6, folios 8, Bill
Complaint, Section XIII, last paragraph).

he appellants ask the Supreme Court of the United States
adjudge that the Constitution of the State as found in the
tion thereof cited is void in certain respects (Transcript,
e 14, folio 19), and insofar as the provisions of that section
ate to the facts pleaded.

he public policy of the State of North Dakota, as declared
aid section of its Constitution, is followed and in part car-
d out by seven certain laws of the State which are recited in
bill of complaint. These laws provide for the establish-
nt and maintenance, by the State, of certain public enter-
ses, and for bond issues incidental thereto; and these mat-
s have come to be known as the industrial program of North
kota.

he appellants ask that these laws and this program be ad-
ged void (Transcript, pages 14 to 17, folios 19 to 23).

he appellants ask that the Supreme Court of the United
tes restrain the defendants, who are officers of the State

of North Dakota, from carrying out its declared public policy and from performing duties with respect to the public enterprises and the industrial program of the State which the laws of the State require them to perform.

The defendants, Lynn J. Frazier, Governor, John N. Hagan, Commissioner of Agriculture and Labor, and the Industrial Commission of North Dakota moved in the District Court of the United States, in which this action was commenced, to dismiss the action because of insufficiency of facts stated in the complaint to constitute a valid cause of action, and because of lack of jurisdiction in the Federal Courts as shown by the facts alleged in the complaint (Transcript, pages 52-53, folio 73½).

Other defendants joined in a similar motion. Decree of dismissal was thereafter granted (Transcript, page 83, folio 116); and the plaintiffs thereafter appealed.

At the hearing below counsel were heard at length as to the right of the plaintiffs to bring the action as well as regarding the questions claimed to arise under the Federal Constitution. The motion to dismiss involves the jurisdiction of the Federal Courts in this, that, unless it appears from the facts involved that right secured to the plaintiffs by the Federal Constitution are threatened with violation, they have no standing in the Federal Courts and can obtain no relief therein, for the reason that their cause does not arise under the Constitution of the United States. From the point of view of the public interests of the State of North Dakota, we conceive that this is the paramount issue upon this appeal. For that reason we do not here discuss the question of jurisdiction arising out of the possible lack of proper interest in the plaintiffs to bring their action in the Federal Courts. Accordingly we address ourselves at once to a discussion of the constitutional issues involved.

Argument

SECTION 1.

Scope of the Argument.

Have the people of a State the power to put in operation the North Dakota industrial program?

If the people of a State ever had that power, they have it now, unless it has been limited or ended by the only higher governmental authority, that of the Constitution of the United States.

We assert that the people of each State have had that power from the beginning of statehood, and that they have it now unimpaired.

This is the field of the discussion that follows.

SECTION 2.

All Original Powers of Government are in the People.

When the people of the thirteen colonies renounced the au thority of Great Britain they took upon themselves all the pow ers of sovereignty and of government. Each state then becam an independent political body, free from external control. It people had all governmental powers.

The entire domain of the privileges and immunities of citi zens of the states, sprung into being upon the Declaration o Independence, lay within the constitutional and legislative pow er of the people of the several states.

The Slaughterhouse Cases, 16 Wall. 36, 1872, p. 409.

"In the beginning the people held in their own hands al "the power of an absolute government. Upon the separa "tion of the British colonies from the British Empire th "people of each colony, then become a state, had absolu "control of life, liberty and property within their sever "territorial domains."

Sharpless v. Philadelphia, 21 Pa. 147, 1853.

Opinion by Justice Black, pp. 159, 160.

The people of the several states, acting in their sovereig capacity, could in their governmental acts exercise an abs lute and unlimited discretion which could not be brought t the test of any restrictive rules.

People v. Salem, 20 Michigan 452 (1870).

Opinion by Judge Cooley, p. 473.

The people of every state then had under their entire con trol every relation of their inhabitants. With those relation they could deal as they saw fit.

Constitutional History of the United States, Geo. T. Cu tis, Vol. 2, p. 163.

In short, in the language of Judge Black in *Sharpless v. Philadelphia* (*supra*, p. 160), the power of the states was supreme and unlimited.

The investiture of supreme and absolute power in the people of the several states was a necessary consequence of the circumstances of the American Revolution. In the passing of sovereignty from Great Britain it could be lodged nowhere but in the people. That sovereignty should be so lodged was in accord with the philosophy of government and of human rights which was to find expression in the institutions of the new nation; and it was the practical actual result of the new condition of nationality.

The first Continental Congress declared in 1774, that "the English Colonists * * * are entitled to a free and exclusive power of legislation *in their several provincial legislatures * * * in all cases of taxation and internal polity, subject only to the negative of their sovereign.*" ("Declaration and Resolves," First Continental Congress). When the negative of the sovereign passed away, the only negative that could supplant it was that of the people themselves.

An instructive view of the extent of sovereign power that became the possession of the American states is found in a review of judicial expressions regarding the extent of the power of the British Parliament.

In the English system the supreme power, the absolute and uncontrollable authority which in all states resides somewhere and from which there is no appeal, has always been held to be lodged in the Parliament.

Constitutional History of the United States, Curtis, Vol. 2, p. 107.

The powers of the English Parliament are transcendent and absolute. It cannot be confined with any bounds either for

causes or persons.

The Englishment Government, by Thos. F. Moran, p. 290, 291, citing Sir Edward Coke.

Sharpless v. Philadelphia, 21 Pa. 147, 160.

When the intent of Parliament is expressed there is no court that has power to defeat it, when that intent is couched in such evident and express words as to leave no doubt of the legislative purpose.

Calder v. Bull, 3 Dall. 386.

Opinion by Justice Iredall, p. 84, citing 1 Bl. Com. 91.

Whatever has come in modern times to be the force which public opinion and the national will exert through the House of Commons, whatever are now the acknowledged rights of individuals, it still remains true that everything is held at the supreme pleasure of Parliament. The power of Parliament like that of all sovereign bodies is limited only by the willingness of the people to obey or their power to resist.

Constitutional History of United States, Vol. 2, p. 108.

The English Government, Moran, p. 290.

Although there have been in English history many statutes charters and public acts which were regarded as fundamental and as embodying various rights of individuals, classes and the crown, all have been subject to the unrestrained power of Parliament.

Constitutional History of United States, Curtis, Vol. 2, p. 115.

"When the people of the United Colonies separated from
"Great Britain, they changed the form but not the sub-
"stance of their government. They retained for the pur-
"poses of government all the powers of the British Parlia-
"ment, and, in state constitutions or other forms of soci-

"compact, undertook to give practical effect to such as
"they deemed necessary for the common good and the se-
"curity of life and property. All the powers which they
"retained they committed to their respective states, unless

"in express terms or by implication reserved to themselves.
"Subsequently when it was found necessary to establish a
"national government for national purposes, a part of the
"powers of the states, and of the people of the states, was
"granted to the United States and the people of the United
"States. This grant operated as a further limitation up-
"on the powers of the states, so that now the governments
"of the states possess all the powers of the Parliament of
"England, except such as have been delegated to the Unit-
"ed States or reserved by the people."

Munn v. Illinois, 94 U. S. 113.

at transcendent power of parliament devolved on the
ican people by the Revolution; and the people of each
in the Union, after the Declaration of Independence and
the adoption of the Federal Constitution, had absolute
ol of life, liberty and property within their territorial do-
. As an eminent judge has expressed it, if the peo-
any state had "given all the authority which they them-
possessed, to a single person, that would have created
potism as absolute in its control over life, liberty and
rty as that of the Russian Autocrat."

harpless v. Philadelphia, 21 Pa. 147, 160.

theory that the universal and absolute power of Parlia-
was transferred to the American people was consistent
he philosophy of government upon which American na-
ty was founded, although the American and British theor-
government were not the same. The view that we have

taken of parliamentary power shows that in the British system, as in almost all other governments of mediaeval and modern times, the idea prevailed that "the government itself is the source of all power and whatever of liberty it allows to its subjects is a concession." "The idea that the source of all power is the people, that the supreme authority is in them, and that the government grants nothing to them and that it derives all its power from them is not the principle of the British political system."

But in America it was "discovered that a government could be founded on the principle that the people themselves are the source of all power; that they can create such government as they may see fit to establish; that they may lay it under any restraint that they may deem necessary to impose upon it." This was the American system as expressed in all the great national documents of the formative period of American nationality; and it was a logical conclusion in law as in philosophy, that the powers of the British sovereignty as vested in the British Parliament became vested in the people of the British colonies when they ceased to be colonies and became independent states.

The practical working conditions of government led to the same result. With the passing out of that element in the British system known as the royal prerogative, from the American system, no part of its powers as expressed in either personal or public functions, devolvd upon any person in America or upon any group of persons less in number than the entire people. Of practical necessity therefore this element of government as pre-existing in the British system was assumed by the people of America in their several state organizations,—a result not only in harmony with the new philosophy of government as expressed in American institutions but also in necessary consequence of it.

From this review of elementary principles and of primary conditions it is clear that if, immediately after the Declaration of Independence, any State of the American Union had by vote of the people adopted a program identical with the North Dakota program, that action would have been authoritative and final. Until the adoption of the Federal Constitution such action by the people of any State could not have been drawn in question. A program so adopted would have become the fundamental law of the State.

By way of illustration of the foregoing propositions it may be remarked that in respect to property, business and persons within the limitations of the respective states their power of taxation was entire and absolute. The extent to which the power of taxation should be exercised, the subjects upon which it should be exercised, and the mode in which it should be exercised, were all equally within the power of the people of the states and within the discretion of the legislatures to which the states committed the exercise of the power. Until the adoption of the federal constitution the will of the people as expressed in their state constitutions or through elections was without limitation. Before the federal constitution the states of the American Union were independent nations in all matters of revenue and taxation.

Lane v. Oregon, 7 Wall. 71.

Constitutional History of the U. S., Curtis, Vol. 2, p. 173.

The powers of the several states that have been for convenience grouped under the term "police powers" are a part of the sovereign power of the people and are a further illustration of that indefinite field of power which belongs to the people of the states in their sovereign capacity. Police powers so-called do not spring from any source outside the states. They do not

exist, for example, as the result of creation by national authority. Their validity is not recognized through the sufferance of the federal government. If there has been any tendency on the part of the federal courts to recognize a wide scope of police powers, that tendency is only a form of recognition on the part of the courts of the fundamental powers of the people of the states, and of the circumscribed operation of the limitations and inhibitions of the federal constitution and its amendments as applied to the functions and powers of the people.

SECTION 3.

WERS DELEGATED BY THE PEOPLE TO THE GOVERNMENT OF THE TATES AND TO THE GOVERNMENT OF THE UNITED STATES.

LE 1. *Powers delegated to State Governments.*

roceeding to exercise the powers thus possessed the people he several states of the Union erected within their jurisdic- such forms of government as they deemed proper and ough the state government so organized they employed such he powers that they possessed as they desired to exercise. n the state governments so constructed the people bestowed ain powers by enactment in appropriate language of au- rization and limitation, and they defined and limited those ers in the written instruments that became known as the e constitutions. Thus began the operation of the state gov- nents, possessing powers delegated by the people and func- ing through officers and agents chosen by the people. In constituting their governments the people of the states nothing of their fundamental powers, nothing of their right ltimate and absolute control over life, liberty and proper- nor of their power to modify the governments so erected or rect other governments in their place.

he form of constitution adopted by the several states is not e taken as the measure of the power of the people with re- t to their government. Before the adoption of the federal stitution the people of the several states could have adopt- ny form of government that they pleased. The people of state might have established a monarchy, just as it was ed suggested by some well known persons should be with respect to the national government. The very limi- ons upon the power of the states inserted in the federal con- tion, as for example, the guaranty of a republican form of

government to each state, show the complete absence of such limitations from the Declaration of Independence until 1787. As stated by Justice Iredall in *Calder v. Bull, supra,* if as a result of the popular decision a state "government composed of legislative, executive and judicial departments were established by a constitution which imposed no limitations on the legislative power, the consequence would inevitably be that whatever the legislative power chose to enact would be lawfully enacted."

If, then, a state of the Union prior to the adoption of the federal constitution had delegated power to its legislature to enact such laws as were enacted in North Dakota in 1919, and the legislature had proceeded so to do, it is clear that such laws would have been valid and incontestable.

TITLE 2. *Delegation of powers to the United States and States resulting from the Adoption of the Federal Constitution.*

Having exercised their powers in part in the erection of state governments, the people of the United States for the purposes expressed in the preamble of the Federal Constitution proceeded to make a national government, and by the terms of the Federal Constitution delegated to it the exercise of certain governmental powers. Thereby the people placed upon themselves and upon their state governments certain limitations; but subject to those limitations the powers of the people within each state, and the powers of the state governments as erected by the people, continued unabated and unimpaired. In each of our references to the Federal Constitution throughout this brief we mean to include its amendments and the necessary implications of its terms as interpreted by this Court, at the time concerned in such reference.

Otherwise than as expressly limited by the federal constitution the power of the people of the state to enact laws for such state, either directly or through the agency of a legislative body continued the same as before the adoption of the federal constitution.

Pine Grove v. Talcott, 19 Wall. 666.

Sharpless v. Philadelphia, 21 Pa. 147, 163.

It continued to be the right of each state to regulate at its pleasure the general relations of persons within its territory to each other as well as all rights to property subject to its jurisdiction. The power of each state extended to everything within the sphere of its control.

Pine Grove v. Talcott, 19 Wall. 666.

American Law 1 *Enc., Br.* 828, by Simeon E. Baldwin.

The states continued to have the right to administer their own affairs in their own way through their own agencies.

United States v. B. & O. Ry. 17 Wall. 322 (1872).

Upon the adoption of the federal constitution the people of each state delegated a portion of their control over life, liberty and property to the United States. They specified what powers they gave, they withheld the rest. All the powers that were delegated by the people to the Federal Government are defined.

Calder v. Bull, 3 Dall. 386.

Sharpless v. Philadelphia, 21 Pa. 147.

That the people of the several states retained all the powers of government not yielded to the United States was assumed to be a fundamental implication resulting from the fact that the powers granted to the federal government were specific, described, limited and enumerated and did not comprehend all the powers of sovereignty.

Constitutional History of the United States, Curtis. Vol. 2, p. 163.

After the adoption of the federal constitution the people of each state in the Union had all control over life, liberty and property within their several territorial domains except the specified portion of that control which had been delegated to the United States.

***Sharpless v. Philadelphia,* 21 Pa. 147, 160.**

The Ninth and Tenth Amendments are the famliar memorials of the demand of the people at the. time of the adoption of the federal constitution for unmistakable written expression of the universal understanding of the relationship of the federal and state governments.

SECTION 4.

Application of foregoing Considerations to the State of North Dakota.

The respective powers of the states of the Union, and their relations to the other states in the Union and to the government are precisely the same in the case of states admitted to the Union subsequently to the formation of the national constitution as in the case of those states which existed at the beginning of American Independence.

McCulloch v. Maryland, 4 Wheaton, 410.

So the powers of the State of North Dakota are the same with relation to the powers of the national government as though the State had been in the Union when the federal government was established. If the power of each of the original states to adopt the North Dakota program,—a power which we have seen was complete at least until the adoption of the Federal Constitution—has not been limited by the Federal Constitution, then North Dakota now has that power complete and without limitation.

SECTION 5.

Certain Considerations Eliminated as Grounds for cla of Invalidity.

If the questions as to the validity of the North Dakota C stitution and laws do not arise under the Federal Constituti then this cause is not within the scope of the judicial power the United States. The appellants contend that their obj tions to the laws do raise questions arising under the Fede Constitution. We shall in order consider appellants' clain but before doing so we shall try to simplify the course of c argument in that regard by pointing out certain considerati that will not be regarded as valid reasons for holding acti by a state to be prohibited by the national constitution.

At the outset it will be conceded that it does not belong the courts to interpolate constitutional restrictions.

Pine Grove v. Talcott, 19 Wallace 666.

The language of Judge Black defining the province of t judiciary in construing a state constitution may aptly be pa phrased and applied to judicial consideration of the powers the states. The federal constitution has enumerated th things which a state may not do. If the courts extend th list, they would alter the instrument, they themselves would come the aggressors and would violate both the letter and spi of the organic law. If the courts can add to the reserved rig of the people (as against the reserved powers of the state they can take those rights away; if the courts can mend, th can mar; if they can remove the landmarks which they fi established, they can obliterate them; if they can change t constitution in any particular, there is nothing but their o

will to prevent them from demolishing it entirely.
Sharpless v. Philadelphia, 21 Pa. 147, 161.

Laws will not be adjudged invalid for reasons based on general principles of public policy or legislative propriety.
United States v. B. & O. Ry. Co., 17 Wall. 322.
Sharpless v. Philadelphia, supra.
Munn v. Illinois, supra.

Laws are not to be set aside and held invalid merely because in the opinion of the courts they are disregardful of right and justice; or are impolitic or inexpedient; or are unwise or oppressive; or violative of the spirit of our institutions; or because they are unnecessary.
Pine Grove v. Talcott, 19 Wall. 666.
United States v. B. & O. Ry. Company, 17 Wall. 322.
McCullough v. Maryland, 4 Wheaton, p.
Calder v. Bull, 3 Dall. 386, p. 394.
Sharpless v. Philadelphia, 21 Pa. 147, 162.

Laws will not be adjudged invalid to relieve against excessive taxation.
McCulloch v. Maryland, 4 Wheaton, p.
United States v. Gettysburg Elec., 160 U. S. 680.
Sharpless v. Philadelphia, 21 Pa. 147.

The possibility of the abuse of power does not justify judicial limitation of power.

Again we may paraphrase the language of Judge Black and apply to the power of the states in their relation to federal control the principle applied by that learned jurist to the relation of legislative power to judicial review and control. The great powers reserved to the states are liable to be abused. This is inseparable from the nature of human institutions. No politi-

cal system can be made so perfect that it will always hold the true course. But there is no reason to suppose that the mere abuse or indiscreet use of the power reserved by the states was meant to be subjected to correction by the federal judiciary nor by any branch of the federal government. In delegating certain powers to the federal government that had originally been possessed by the states it was not intended by the people that as to powers reserved the federal judiciary should exercise a general supervision and control to the end of correcting possible abuses of those reserved powers.

Sharpless v. Philadelphia, 21 Pa. 147, 161.

All power may be abused where no safe-guards are provided. The remedy in such cases lies with the people and not with the judiciary.

Pine Grove v. Talcott, 19 Wall. 666.

That a power may be abused is no argument against its existence. For protection against abuses by legislatures the people must resort to the polls not to the courts.

Munn v. Illinois, 94 U. S. 113, p. 134.

But on the contrary an act will be declared void only when it violates the constitution clearly, palpably and plainly.

Calder v. Bull, 3 Dall. 386.

Sharpless v. Philadelphia, 21 Pa. 147, p. 164.

But when a question arises as to whether a state in any of its functions,—whether by direct popular action as in the adoption of a constitution, or by delegated authority, as in the case of legislative, executive or judicial proceeding,—has attempted to act in a manner now prohibited by the federal constitution, then an issue arises which must be determined by the courts, with ultimate responsibility under the federal constitution upon the federal courts. It is immaterial from the federal view point as to the validity of an act drawn in question—whether

it is the act of the whole body of the people of a state or of delegated agents of the people. The material and sole question, in determining such an issue, is, has an attempt been made to exercise in behalf of a state of the Union an authority now forbidden to the states under the limitations and inhibitions of the federal constitution?—or is the act in question within the scope of those unimpaired powers of the several states which, existing from the beginning, continue unaffected by that delegation of certain powers which was made by the states to the general government? The answers to these alternative questions will be identical in effect, for an act of a state is within the original powers that we have stated unless it is found to be restrained by the Federal Constitution. The question, therefore, for federal courts in each instance is to be determined by the Constitution, as by them interpreted, and by nothing else; and unless the issue presented arises under the Constitution, the federal courts have no jurisdiction to determine it, no matter what other considerations are involved.

SECTION 6.

Summary of Appellants' Claims.

We are now ready to inquire as to the grounds upon which appellants found their contention that North Dakota has attempted to exercise powers of statehood prohibited by the Federal Constitution.

These grounds are stated substantially on pages 58 to 62 of their brief. They are presented in the form of "three claims under the Federal Constitution."

The three claims of appellants may be summarized as follows:

First: The North Dakota program, and the taxation incident thereto, violates fundamental rights of the plaintiffs, as citizens of a free government.

Second: The North Dakota program, established by the State Constitution, as amended, and the seven laws in question, violates the guaranty of a republican form of government.

Third: The North Dakota Constitution, as amended, and the laws in question are repugnant to the Fourteenth Amendment to the Federal Constitution.

SECTION 7.

Appellants' First Claim.

TLE 1. *Statement.*

The first claim, which we are not surprised to observe seems be somewhat doubtfully submitted, is that the North Da-a laws "violate the fundamental rights of the plaintiffs as izens of a free government" (Appellants' Brief, page 58). is is the first of the three claims "under the Federal Con-tution."

TLE 2. *The Topeka Case.*

Counsel cite the *Topeka Case* (20 Wallace 665), and it may that they have been misled by language employed in the inion in that case;—language which, we think, was perhaps t necessary to the decision of that cause, and was inadvertent-used by the learned judge who wrote the opinion, but which any event can not be accepted as the deliberate and ultimate xpression of the doctrine of the American constitutional sys-m.

The language quoted begins with this statement: "It must e conceded that there are such rights in every free government eyond the control of the state." That there are rights in every ee government beyond the control of the state, that is of the overnment, is a statement of fact which as such is not true. It hould be conceded, it may without fear of contradiction be sserted, that there are rights of individuals which no free gov-rnment should disregard or curtail, but which on the contrary very free government should protect and maintain; but it is a mere denial of fact to say that any such right of its citizens is beyond the control of the state. On the contrary the control of

the state must be invoked and exercised for the effectual maintenance and protection of such rights.

Historic instances are not lacking to illustrate the completeness of the control of governments, both free and autocratic, over individual rights of all kinds, many of which in our American system we consider as fundamental and not appropriate to the exercise of governmental interference, as we show elsewhere. The parliament of Great Britain has full and complete and absolute control of the rights of individual citizens within the British domain. In every government there resides absolute ultimate control of all such rights and it is because of this fact that it is infinitely important how and by whom in the government such control is exercised.

The learned judge suggests the hypothesis, "if a man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others," as though the condition were avoidable and optional; but it is not. No man liveth by or for himself alone. The avoidance of the condition stated in the passage just quoted is impossible. Every man does hold all that he is accustomed to call his own because society organized in government makes such holding possible. All in which the citizen places his happiness is secure, if it be secure, because it is secured by the state. Individual property, individual happiness, individual security rest upon the state; and because these things rest upon the state they are inevitably and perpetually under the dominion of the state. Autocratic, tyrannical, oppressive government, under whatever name, may exercise that control to the disparagement, diminishing and destruction of individual property, individual happiness and individual security. The very problem of enlightened government as conceived in the American system since its inception is so to control individual property,

piness and security that they shall be promoted by promot-
the greatest good of the greatest number. How to solve
t problem has been the study of American statesmen and
riots. From the beginning up to now the solution has been
empted and carried on through the inspiration of an abiding
th in democracy. To nothing less than the whole body of
e people has been confided the great work of government.
on the whole body of the people has devolved every duty and
ligation that rest upon a state, in the full confidence thus
r justified by experience, that not only does correct theory
d righteous doctrine point to democracy as the true judge in
man affairs, but also that the wisdom of experience points
the same conclusion.

Since it is inevitable that in organized society there must
mewhere be a supreme authority invested with all the power
government,—power exercised either directly or by dele-
ation of authority in such manner as shall be determined by
e will of the sovereign,—the question has long been debated
to where or in whom that supreme authority should be lodg-
d. Justice Miller expressed a doubt, if we follow his langu-
ge to its necessary conclusion, whether it were not better to
odge the power of "unlimited dominion" in one man than in
many. But that is not the theory, nor the practice of eith-
r the American or the English system. In Russia "unlimited
dominion" was formerly possessed by one man, although his
cts of individual authority gradually diminished in signifi-
cance up to the end of the career of autocracy. In England "un-
limited dominion" resides in parliament, but the influence of
custom and of public opinion is an effectual and sufficient re-
straint. In the United States "unlimited dominion" can be
found nowhere but in the people; but in them it is found—the
power to make and unmake constitutions and laws, to create

and terminate institutions, to formulate and abandon policies and enterprises, to select and change agencies of administration, without let or hindrance; excepting only that the people of each state, when acting collectively in their capacity of statehood, are limited by the operation of the terms of that instrument of higher sovereignty, the federal constitution, by which they are forever bound together with the people of the other states in the American Union.

Justice Miller remarks that "the theory of our governments, state and national, is opposed to the deposit of unlimited power anywhere." In the sense presumably intended this is of course true. "The executive, the legislative and the judicial branches of these governments are all (possessed of) limited and defined powers." That is to say, to no branch of their governments, either national or state, have the American people, out of their own unlimited dominion, delegate unlimited power; so that no president or governor, no congress or legislature, no court either federal or state, is justified in assuming any authority or in exercising any power, that is not found to be delegated by the people in the terms of federal or state constituton.

But in erecting governments, in establishing constitutions, in delegating certain limited powers to officers of their choice, the people have not shorn themselves of any of their own ultimate powers. Officers and constitutions and governments that they have made the people can unmake. Contemplating the exercise of the power to unmake, the people have provided a method for it. In the orderly American way officers can be changed, constitutions and governments can be amended. New officers may be chosen, or the old continued. Old constitutions may remain, or new constitutions be established. This admirable system, founded upon faith in government by the people, deposits unlimited powers in no delegated authority, but leaves the people always supreme.

We think that our meaning will now be understood when we undertake to qualify the language of Justice Miller in the *Topeka Case* contained in his statement that "there are limitations on such power which grow out of the essential nature of all free governments." If this language is understood to be restricted to such power as has been deposited by the people with any department or agency of their government, then it is accepted as true; but if it is understood as a statement of limitation of the power of the people, it must be rejected, for the reasons that we have endeavored to make appear above. It is indeed true that there are "reservations of individual rights" which should be respected by all governments, the failure to respect some or all of which has from time to time led to the destruction of one form of government and another. Some of these individual rights have in the American system been protected by express designation, written by the people in the fundamental law of state and nation. These individual rights it is the duty of the courts to protect against attempted invasion by legislatures and by congress. It is the glory of the American system and it is among the fairest laurels of the courts of our country, that such rights have been upheld at the bar and by the bench. But there are other individual rights among those which governments should respect which the American people have not so guarded, but which are left to be protected, regulated or controlled by the legislative representatives of the people. As to all rights, both as to those written into the constitution and as to those left to the discretion and judgment of the legislature, it remains true that they are still subject to the control and dominion of the people, in any case in which the people shall see fit to act. Neither executive, nor legislative, nor judicial department of the government can assume either the power or the right to dominate, control or defeat the people's judgment and will. Such an

assumption, if made by the courts, would involve the hypothesis of wisdom and good faith, of moral understanding and righteousness, of worthy purpose and just appreciation of the common welfare, superior in the courts to that found in the people who have made the courts. Such an hypothesis is fundamentally at variance with the genius of American institutions.

We do not at this time undertake a distinction, easily to be made, in the facts as stated in the *Topeka Case* and in the facts appearing in the case at bar. We now content ourselves with the discussion that has been submitted as to the language quoted from Justce Miller's opinion in appellants' brief. It is upon the theory of constitutional government propounded in the language quoted that appellants seem to rely; and therefore it has seemed fitting thus far to consider that language and that propounded theory rather than the facts involved. As a statement of what we conceive to be the true view of the American constitutional system, we submit with confidence the following language found in the dissenting opinion of Justice Clifford, which it appears to us is, as a general statement of the principles of our government, unassailable; and it is pertinent to the issues involved in the instant case:

> "Courts cannot nullify an act of the state legislature
> "on the vague ground that they think it opposed to a gen-
> "eral latent spirit supposed to pervade or underlie the con-
> "stitution, where neither the terms nor the implications of
> "the instrument disclose any such restriction. Such a
> "power is denied to the courts, because to concede it would
> "be to make the courts sovereign over both the constitu-
> "tion and the people, and convert the government into a
> "judicial despotism." (*supra*, page 669).

Unless, therefore, appellants are able to point out some specific right protected by the federal constitution, which it would

ppear under the *Topeka Case* has been threatened with im-airment, we submit that the *Topeka Case* cannot avail as au-hority to support the first proposition or claim presented by he appellants' brief, on page 58.

ITLE 3. *Other Cases.*

By way of further support for their first proposition the ap-ellants cite eight other cases as following the *Topeka Case,* none of them referring to the Fourteenth Amendment" (Ap-ellants' brief pages 59, 60).

We will undertake consideraton of these cases briefly in hronological order.

The earliest of these eight cases, then, is that of *Burlington . Beasley,* 94 U. S. 310, (1876). This decision makes no eight for the appellants. It holds a certain bond issue to be alid, citing the *Topeka Case,* which had reached a negative re-ult, to distinguish that case from *Burlington v. Beasley.*

The next case was *Osborne v. Adams,* 106 U. S. 181 (1882). he opinion in this case involved no consideration of any feder-l question, nor of any question of abstract justice or general rinciples such as were discussed in the *Topeka Case.* The pinion which closely followed the facts involved was based olely upon a constructon of the Nebraska statute under the Ne-raska constitution as aided by the decisions of the courts of Nebraska. The report of the case does not disclose how the ause found jurisdiction in the federal court. It may have been hrough diverse citizenship; but in any event the decision throws o light upon any issue involved in this cause.

The next of these eight cases, in chronological order, is that of *Parkersburg v. Brown,* 106 U. S. 487 (1882). This case also as decided upon construction of a state law and a state con-itution, those of West Virginia (page 501). It is somewhat

loosely stated in the opinion that the bonds considered are void "within the principles" of the *Topeka Case*. But an examination of the whole opinion fails to disclose that the line of reasoning or the principles announced in the *Topeka Case*, had anything to do with the conclusion reached in the *Parkersburg Case*. It has no weight in support of the contenton of the appellants herein.

Appellants' next citation in point of time brings us to *Osborne v. Adams*, 109 U. S. 1 (1883), which is merely a denial of rehearing of the case in 106 U. S. 181, and the comments made above as to that case are applicable to this.

Blair v. Cuming County, 111 U. S. 363 (1883) is another case resting upon the construction of a state law and a state constitution, those of the state of Nebraska; and as in the *Burlington case, supra*, a bond issue was held valid. We cannot find that the *Topeka Case* is even mentioned, to say nothing of its being followed.

The case of *Cole v. LaGrange*, 113 U. S. (1884), is still another instance of construing a state constitution—that of Missouri,—and holding that an act of the Missouri legislature was void thereunder. No federal queston was raised or is involved. The opinion cites specific provisions of the Missouri constitution and construes them as rendering invalid the legislative attempt to authorize certain bonds, to be issued by the city of La Grange. The reasons for the construction stated do not concern the issues in the present case. It is true that in the opening paragraph of the opinion Mr. Justice Gray uses language of wider scope and meaning, but the propositions therein announced are not necessary to the decision reached by the court. Moreover, the propositions announced in that paragraph relate wholly to legislative power as derived from "general grant of legislative power in the constitution of a state." The language does not relate to, nor purport to limit.

legislative power granted specifically by the people of a state for a particular purpose. The closing statement of the paragraph mentioned,—"these limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject,"—either was intended to be understood in the sense just expressed, or else it is incapable of justification by the history of adjudicated cases up to that time. Consideration of the line of cases cited by appellants which we have just run over, shows that as an abstract proposition the decided cases had establshed no such limitations at the time this case of *Cole v. La Grange* was determined. The importance of the point justifies repetition of the assertion that in this case of *Cole v. La Grange* no federal question was involved and no question of abstract principles; and that if any of the language of the opinion seems to involve such questions, such language is not to be regarded as the authoritative and deliberate judgment of this court. In fact the particular consideration given in the opinion to specific provisions of the Missouri constitution seems to intimate, if it does not plainly suggest, that the legislation held invalid under those provisions, might have been held valid if appropriate provisions had been found in the Missouri constitution, placed there by the people appropriate to the effectuation of such laws. As an authority *Cole v. La Grange* has no other significance than is expressed in the two paragraphs which constitute the syllabus at the head of the reported case.

TITLE 4. *Dodge v. Mission Township.*

In addition to the six cases just considered appellants also cite on page 60 of their brief, two cases from courts other than the Supreme Court of the United States. One of these, *Dodge v. Mission Township,* 107 Fed. 827, on account of the distin-

guished ability of the judge writing the opinion, is entitled to much consideration. But even that learned judge has been led into formulating doctrines respecting the powers of the courts which we submit are not warranted either by weight of authority, or by full consideration of the American system. For if anything is clear in our constitutional system it seems to us that it is this: That the jurisdiction of the federal courts does not "lie deeper" than the federal constitution. The federal courts have no authority other than that which is granted to them by the constitution, and they are limited in their jurisdiction and in their powers to the scope within which the constitution operates. If this were not true it might happen that the federal constitution should in due course be so amended as, for example, explicitly to authorize and validate the statute held invalid in the *Dodge case;* and yet the federal courts, having, according to the *Dodge case,* a jurisdiction deeper than the constitution, could still disregard the peoples mandate and declare that law invalid and not enforceable, which the people through the states had declared enforceable and valid. Such a conclusion is manifestly absurd; but the only alternative conclusion is that the federal courts must be controlled by the federal constitution and can exercise only such powers and jurisdiction as they derive from it. It is the constitution that is the supreme law of the land, not the judgment of the courts. It is a mere commonplace to say that it is the function of the courts to interpret the constitution; and it is hard to understand how any judge should even inadvertently declare that the courts may pass beyond that function and declare that to be the supreme law of the land, which is not found in the terms of the constitution of the United States. A legislative act may be "an arbitrary decree," if one wishes to call it such; but it is nevertheless a law unless it is repugnant to the Constitution, and whether such an act is beyond the limits of the powers

anted by the people to the enacting legislature, is to be de-
rmined by the constitution,—the constitution as interpreted
the courts, but by the constitution and nothing else; not
any "general law" or any "underlying principle" or any
ncept whatever of governmental duty or obligation other
an is found in the constitution.

In this last mentioned case of *Dodge v. Mission Township,*
rtain authorities are cited. Of these some have already been
nsidered but there is one other to which we may now prop-
ly call attention although it is not included in the list of
ses cited by appellants in their brief. This is the case of
lder v. Bull, 3 Dallas. 386.

The opinion in *Dodge v. Mission Township* cites a passage
om the opinion in *Calder v. Bull,* in which it was remarked by
r. Justice Chase that as to certain supposititious legislation
would be of such unreasonable character that there could be
presumption that the people of the state intended to entrust
legislature with the power of making such enactments. This
ctum had nothing whatever to do with the decision reached
Calder v. Bull, as is apparent from the circumstance that
e Connecticut law drawn in question was upheld by the Unit-
l States Supreme Court. Yet this dictum of Justice Chase's
nd others similar found in his opinion have frequently been
uoted by the Courts of this country as authoritative prece-
ent and as supporting the contention that it was proper for
e Courts to deny legislative power to the states to enact laws
hich the Courts might deem against natural justice. The
hole case of *Calder v. Bull* is not entitled to be considered an
uthority for any such doctrine. Justice Chase was one of
hree judges of the Court who filed opinions in that case and
o more expressed the judgment of the Court as to the point
question than either of the other two; and no opinion of the
hree can be regarded as having weight as an authority except

as it announced views upon which the decision of the whole Court was based.

Against the propositions referred to in Justice Chase's opinion we may place the views of Justice Iredell, another judge who wrote an opinion in the same case. He said:

> "If the legislature of the Union, or the legislature of any "member of the Union, shall pass a law within the general "scope of their constitutional power, *the Court cannot pro-* "*nounce it to be void merely because it is in their judgment* "*contrary to the principles of natural justice.* The ideas "of natural justice are regulated by no fixed standard: the "ablest and the purest men have differed upon the subject; "and all that the Court could properly say in such an "event would be that the legislature (possessed of an equal "right of opinion) had passed an act, which in the opinion "of the judges, was inconsistent with the abstract princi- "ples of natural justice."

SECTION 8.

Appellants' Second Claim.

As to the second of the three claims propounded by appel-
nts (Appellants Brief, page 60), that the seven legislative
ts in question are violative of the guaranty of a republican
rm of government expressed in Section 4, Article 4 of the
nited States Constitution, we need submit but short comment
re. Unless we wholly misconceive both the principles of our
nstitutional government and the exposition of those prin-
ples contained in adjudicated cases, there is scarcely room
r argument under this head. The subject is fundamentally
d exhaustively treated in cases decided in this court.

Luther v. Borden, 7 Howard 1.

Pacific States Telephone Co. v. Oregon, 223 U. S. 118.

Kiernan v. Portland, 223 U. S. 151.

Ohio v. Hildebrandt, 241 U. S. 565.

It seems to be too well settled for discussion that the claim
ised in this regard by the appellants is not a justiciable ques-
on. It would be presumptuous to undertake restatement of
e reasons supporting this conclusion. As to the qualifica-
on of the authority of the *Oregon Case* suggested on page 61
Appellants' Brief, it need only be remarked that in our un-
rstanding of the language quoted from the opinion of the
ief Justice, there is no intimation that an infringement of
dividual constitutional rights, if claimed, might be prevented
der the guaranty of republican government to the states of
e Union. The whole doctrine of the case points to a contrary
nclusion. Our understanding of the language of the opin-
n is that if the defendant company in the *Oregon Case* had
lt itself aggrieved in respect to violation of any of its con-

stitutional rights, it might have been heard in a justiciable controversy arising under provisions of the federal constitution appropriate thereto, but not under the provision found in Article 4, Section 4; and that is the situation of the appellants in this cause.

SECTION 9.

Appellants' Third Claim.

Title 1. *Scope of the Issues Involved under this Claim.*

Coming now to the third contention or claim of appellants, stated by them to be their chief contention (Appellants' Brief page 61), namely, that the constitutional amendments and legislative acts in question are void under the Fourteenth Amendment to the Federal Constitution, let it be noted, if the court please, that the contention specifically includes the constitutional amendments of North Dakota recited in the bill of complaint; that is to say, the North Dakota constitution as it now stands in respect to the provisions touching which the appellants complain.

The seven laws in question are authorized by the North Dakota constitution as it now stands. The state courts have specifically so held; there can be in reason no contrary contention; and the appellants make no other claim—indeed the appellants, as they must necessarily do, concede the identity in substance of the constitution and these laws of North Dakota by asserting their equal vulnerability, in respect to their repugnancy to the Federal Constitution.

It is important to keep this feature of the pending controversy in mind, because thereby it is understood that herein the dispute is not as to the function of a representative, legislative body exercising or assuming, or pretending to exercise, delegated authority. The question here is not a construction of the powers of a branch of a state government, as defined by expression, or implication, or limitation, in the terms of a state constitution. The question is whether the people of a state have a right to adopt just these provisions that are found

in the North Dakota constitution. It is the validity of the act of the people themselves that is drawn in question. No adjudicated case is persuasive that does not reach to this extent. No principle is available in support of the complaint that does not take into consideration fundamental acts of the people. No provision of the Federal Constitution supports the contention of the appellants, unless it is so to be interpreted that it exercises its forbidding power upon the people themselves in their capacity as a state.

TITLE 2. *The Contention Centers upon the Terms of the Fourteenth Amendment.*

We assume that it has been satisfactorily shown that if there is anywhere an effectual limitation upon the people of a state prohibiting the enactment of such a fundamental law as the appellants attack in the North Dakota constitution, such limitation can exist only in some provision of the Constitution of the United States,—some provision of that instrument which palpably and clearly, by expression or necessary implication, prohibits and restrains the people of every state from the act in question.

It has been shown also that the people of the states from the time of the Declaration of Independence to the time of the adoption of the Federal Constitution, at least, in the exercise of the sovereign powers possessed by the people as a part of the ultimate sovereignty lodged in them upon separation from Great Britain, did possess the capacity and power to enact and enforce such provisions of law as are contained in the Constitution of North Dakota and as are expressed more in detail in the seven laws founded upon those provisions, all of which are here assailed. It appears moreover that by virtue of the adoption of the Federal Constitution by the states of the

ion, although that instrument did contain certain limitations on the pre-existing powers of the states, yet those limitations, whether express or implied, did not include any prohibition or other form of restraint laid upon the states or the people the states which would have prevented or would now prevent adoption or enforcement by the people of any state of h provisions as these in the Constitution of North Dakota e drawn in question. This does not need to be argued in s cause for it is admitted in the position taken by appellts. Leaving out of consideration the hesitant reference by pellants' counsel to the guaranty of a republican form of vernment, we find that they pass over all provisions of the tional constitution and its amendments up to the time of the option of the Fourteenth Amendment and they discover in of those original provisions of the fundamental law no ovision, no limitation, no restraint which can be urged as a op for their contention. But they point to the Fourteenth nendment and seek under its provisions the judgment of this urt that the people of the state of North Dakota have exeded their powers.

"Down to 1868, when this amendment was adopted, it "was, as to most matters, for the state alone to settle the "civil rights and immunities of those subject to its juris-"diction. If they were to be free from arbitrary arrests, "secure in liberty and property, equal in privilege and "entitled to an impartial administration, it was because "the constitution of the state so declared."

"American Law" 1 *Enc. Br.* 828; Article by Prof. *Simeon E. Baldwin.*

TITLE 3. *General Relation of the Fourteenth Amendment to this Cause.*

The effect of the Fourteenth Amendment was indeed to restrain the states in the exercise of certain powers that they previously had. As expressed in *Minneapolis v. Beckwith,* 129 U. S. 26 (1888), "the Fourteenth Amendment prohibits discriminating legislation in favor of particular persons as against others in like condition." Is its scope wide enough to apply to the subject matter of this cause? Construing the amendment not only by its naked language but by the pre-existing body of the constitution and the changes intended to be made therein, the powers of states that up to the time of its adoption had existed unimpaired, the historic conditions that had induced congress and the states to conclude that some further limitation was expedient, and the results sought to be accomplished by the amendment,—in view of all these conditions, we inquire whether the prevention of such fundamental acts as these of the people of the state of North Dakota was within the intent of congress and the states when they adopted the Fourteenth Amendment, and whether its language, so construed, can be held a prohibition of such enactment by the people of the states. "In any fair and just construction of any section or phrase of this Amendment, it is necessary to look to the purpose which was its pervading spirit, the evil which it was design to remedy" (*Slaughter House Cases,* 16 Wallace, 36, 72).

It is appropriate to quote further from the opinion in the case just cited. In view of the character of the claims made by appellants and of the results that would follow a judgment in this cause in conformity with their contention, this language of Mr. Justice Miller is apt for our consideration:

"When these consequences are so serious, so far reach-

"ing and pervading, so great a departure from the struc-
"ure and spirit of our institutions; when the effect is to
"fetter and degrade the state governments by subjecting
"them to the control of congress (in this instance of the
"courts), in the exercise of powers heretofore universally
"conceded to them; when in fact it radically changes the
"whole theory of the relations of the state and Federal
"Governments to each other and of both these Govern-
"ments to the people; the argument (drawn from the con-
"sequences urged against the adoption of a particular con-
"struction of an instrument) has a force that is irresisti-
"ble, in the absence of language which expresses such a
"purpose too clearly to admit of doubt" (Opinion of the
"Court, page 78).

In the light of this declaration of this Court and of the reasoning that led up to it in the preceding portions of the opinion in the *Slaughter House Cases,* we turn to consider whether it was the purpose of the Fourteenth Amendment to abridge the power of the state of North Dakota to put into effect the will and purpose of its people as expressed in the amendments adopted in 1918.

TITLE 4. *Propositions involved in Appellants' Line of Reasoning under the Fourteenth Amendment.*

Appellants' argument as to the effect of the Fourteenth Amendment is based upon elusive grounds, and their conclusions are reached somewhat in the form of mere assertion. We undertake to restate their position under the Fourteenth Amendment as gathered from their brief on pages 61 and 62 and pages 85 to 114, as follows:

1. It is the settled law of the United States that the right of taxation can only be used in aid of a public object.

2. Therefore, taxation for a private purpose constitutes taking property without due process of law.

3. A public object is an object within the purposes for which governments are established.

4. The state enterprises are not objects within the purposes for which governments are established.

5. The state enterprises are a private business, or to put it otherwise, the purpose of the state enterprises is a private purpose.

6. Therefore, taxes cannot be levied under the settled law of the United States in aid of the state enterprises, because taxation in aid of the state enterprises is a taking of property without due process of law and is repugnant to the Constitution of the United States.

It will be noted that the first three propositions stated above are in effect quoted from page 62 of appellants' brief, except that we have substituted in the first proposition the words "the United States" for the words "this country," used by appellants' counsel. The distinction is obvious and must be made. We are discussing here and must be governed by the law of the United States in its application to the laws of North Dakota. The phrase used by appellants' counsel is broad enough to include the law of each one of the states of the Union as interpreted or determined by their local courts. With that body of state law we have no concern, although of course in reaching conclusions upon principle we may be aided by the reasoning employed by learned judges of state courts.

TITLE 5. *Erroneous Assumption as to the State of the Law regarding Taxation contained in Propositions 1 and 2 recited under the last Title.*

But is it true, as placidly assumed by counsel, that it is the settled law of the United States, that the right of taxation can only be used in aid of a public object?

What is the "settled law" of the United States? For the purposes of this cause and of testing the validity of counsel's argument, we are interested in defining the settled law of the United States only in so far as that settled law has to do with the powers of the United States government and with the jurisdiction of the United States courts to prevent the operation of powers claimed by the government of a State. That whole body of settled law is to be found, and found only, in the Constitution of the United States. In that sense it is certainly true, as stated by Baldwin in his article on American Law in the Britannica, that "the United States as a whole has no common law" (1 Enc. Brit. 828).

Unless it can be shown that under the Constitution "the right of taxation can be used only in aid of a public object," it cannot be asserted truly that that is the settled law of the United States. The first proposition, therefore, of appellants' counsel as stated above is a *petitio principii,* it begs the question; for the appellants must show and cannot simply assume that the Constitution of the United States thus limits the powers of the several states. Appellants have cited neither any language of the Constitution which expresses such a limitation nor any decision of this court which so interprets any provision of it.

The Topeka Case, the Dodge Case and the La Grange case, cited on pages 62 and 88 of the appellants' brief, we have discussed elsewhere.

Fallbrook District v. Bradly, 164 U. S. 112, is cited on pa
88 of appellants' brief. We have not considered this case el
where and therefore now quote from the opinion therein by M
Justice Peckham the following:

> "If the act violate any provision, expressed or proper
> "implied, of the Federal Constitution, it is our duty to
> "declare it; but if it does not, there is no justification f
> "the Federal Courts to run counter to the decisions of t
> "highest State Court upon questions involving the co
> "struction of state statutes or constitutions, on any alleg
> "ground that such decisions are in conflict with sou
> "principles of general constitutional law."

The Court proceeds thereupon to inquire whether the a
therein drawn in question, *as construed by the State Cou*
violates the federal constitution (page 156); and thereupon r
marks "*there is no specific prohibition in the Federal Cons*
tution which acts upon the states in regard to their takin
private property for any but a public use" (page 158).

It is further remarked on the same page of the opinion tha
"it is claimed, however, that the citizen is deprived of h
property without due process of law, if it be taken by or und
state authority for any other than a public use, either under t
guise of taxation or by the assumption of the right of emine
domain. In that way the question whether private propert
has been taken for any other than a public use becomes m
terial in this Court, even where the taking is under the author
ty of the state instead of the Federal government." But i
this case it was not decided that the claim as stated in th
opinion just quoted is a valid claim; for upon the fac
thereinafter considered, it is held that the use in aid
which the tax was to be levied was a public use and therefo
in any view of the Constitutions involved must be sustaine

This case, therefore, does not aid the contention of the appellants.

The recent case of *Jones v. Portland,* 245 U. S. 217, is grouped with the *Topeka Case,* 20 Wallace 655, in support of the statement that it has been by this court "established beyond cavil, that there can be no lawful tax which is not laid for a public purpose" (Appellants' Brief, page 88). The words here quoted are from the opinion in the *Topeka Case* (page 664), and the *Portland Case* is cited doubtless because it cites the *Topeka Case* with approval. With all deference to the distinguished jurist who wrote the opinion in the *Topeka Case,* we submit that we have shown reasons elsewhere in this brief for doubting the conclusion as to the interpretation of the federal constitution which seems to be stated in the language just quoted. The language of the opinion in the *Portland Case,* does not go to the length of supporting the proposition quoted from the *Topeka Case,* but moderately assumes, upon the authority of that case, that the general doctrine therein stated is "well settled," namely, "that exertion of the taxing power for merely private purposes is beyond the authority of the state" (*Jones v. Portland,* 245 U. S. at page 221). Now the *Portland Case* in its conclusion fully supports, as we understand it, the validity of the laws here assailed. The passage last quoted, which is the passage relied upon by appellants in their citation of the case at page 88 of their brief, was not of course a part of the reasoning by which the conclusion and decision of the Court in that case was reached; and it is therefore not within the scope of the authority of that case as a precedent. The language indicated is, as we understand it, merely a concessive statement, assuming, without supporting, the correctness of the dicta in the *Topeka Case,* but rendering judgment favorable to the law attacked notwithstanding such concession.

While referring to the appellants' citation of the *Portland Case,* we note here that, on page 109 of their brief, they have done violence to the reference made by this Court in that case to the case of *Laughlin v. Portland,* 111 Maine 488. The quotations reproduced on page 109 of appellants' brief, are there stated to have the approval of this court as though this court intended to be understood as adopting the language of the excerpts so reproduced. It seems to us clear that no such thought was in the mind of this Court as expressed in the opinion in *Jones v. Portland.* If we correctly understand the intention of the Court, the opinion in the *Laughlin case* was quoted to show the view held by the Maine court as to the facts as well as the law, and not for the purpose of defining limitations upon the powers of the states as assumed by appellants.

We submit, therefore, that appellants have wholly failed to show that it is the settled law of the United States that the right of taxation can only be used in aid of a public object. We have shown that such settled law, if it exist, must be found in the constitution; and we have shown further, both that there is an entire absence of such provision expressed in the Constitution, and that there is no implication of any such limitation in the Constitution as interpreted by the decisions of this Court. If we are right in this position, and it seems to us that the position is incontrovertible, then the reasoning of the appellants in this case falls to the ground. For if their first proposition is not true, then their second proposition falls with it. The second proposition that taxation for a private purpose constitutes taking property without due process of law is assumed by the appellants to follow as a conclusion upon the first proposition because if the first proposition be accepted as true, then due process of law is not observed by the exercise of the power of taxation for a private purpose. Obviously then, if the first proposition falls, the second goes with it.

TITLE 6. *The Third Proposition, recited under Title 4 above, as to what Constitutes a Public Object and a Public Purpose; and therewith the Fourth and Fifth Propositions, as to the Character of the North Dakota enterprises.*

We now take up the third proposition stated above, namely, that a public object is an object within the purposes for which governments are established; and with that proposition it is convenient also to consider the fourth proposition, that the state enterprises in question are not objects within the purposes for which governments are established, and also the fifth proposition, that these enterprises are a private business conducted for a private purpose. Reduced to the simplest terms these three propositions amount to this: That in the opinion of the appellants in this cause as citizens and taxpayers of North Dakota, the state ought not to engage in the enterprises which they assail.

TITLE 7. *Subject of Title 6 continued, as to the Purposes of Government.*

"An object within the purposes for which governments are established:"—what indeed are the purposes for which governments are established if not the purposes of the people who establish them? The purpose for which the government of Japan was established is one thing. The purpose for which the government of the France of Napoleon III was established is another thing—of the France of the present republic still another. The purpose for which the government of these States of the Union was established was to give an opportunity for the people of the States to determine their own laws, their own in-

stitutions and their own destiny. We have shown elsewhere in this brief that the people of the several states, at the times when their respective governments were established, had complete, absolute and unlimited power to formulate and effectuate any purpose whatsoever that it pleased them so to do. The phrase "are established," we take it, means in appellants' brief, as it should mean, both the inception of governmental creations and their continued existence. In that continued existence of established governments the purposes of their continued establishment may be as varied as the purposes of their inception. If the governmental form is autocratic, the autocrat may change the governmental purpose by a stroke of his pen. If the governmental form is democratic, the people by their ordered processes of decision may change the governmental purpose to conform with the changing judgment of majorities. Suppose we grant appellants' proposition that "a public object is an object within the purposes for which governments are established." What follows? This: That a public object in a government controlled and operated by its people is an object which the people seek to accomplish through their governmental functions, agencies, instrumentalities and forms. What is public, indeed? It is that which relates to the mass, to the generality, to the commonality of mankind as distinguished from that which is personal, individual and private.

TITLE 8. *Inquiry as to the Enterprises involved; Judicial Notice of Facts.*

With these considerations in mind, what have we to say to the appellants' assertion that the state enterprises here assailed are each a private business and that the purpose of each is a private purpose?

We may as well consider here, what these enterprises are,

shown by the allegations of the bill of complaint, taking to consideration therewith, as it is our duty to do, those facts history and of present circumstance which are within common knowledge and of which judicial notice is taken. Let us ot be misunderstood. We do not mean by suggesting matrs other than the mere allegations stated in the complaint, intimate that we want to go far afield in exploring matters ther than those appearing in the printed record. We could onfine ourselves to the printed words of the Constitution and aws of the State of North Dakota, and still urge every argument presented in this brief with the full force appropriate to s cogency. But we do not accept appellants' intimation that e should be blind to facts of history and common knowledge. hese are before the Court as truly and properly as if pleaded, nd are to be considered with the facts pleaded in the complaint. If facts judicially noticed will aid the court in determining its jurisdiction, the Court will not ignore such facts. The United States District Court of North Dakota is presumed to know the Constitution and law of the state, and in order to make up its opinion, it seeks information from any authentic and available source, without waiting for the formal introduction of testimony to prove it, and without confining itself to the process which the parties may offer.

Luther v. Borden, 7 How. 1, 46.

TITLE 9. *The Enterprises Involved: The Mill and Elevator Association.*

First, consider the Mill and Elevator Association Act (Transcript, pages 40-42). "For the purpose of encouraging and promoting agriculture, commerce and industry, the State of North Dakota shall engage in the business of manufactur-

ing and marketing farm products," and for that purpose shall engage in certain subsidiary functions and enterprises. In view of the agricultural character of the state, this act is, in a sense, the keystone of the arch. As to the extent of the state's agricultural interest and of the essential relation of that interest to every other commercial, industrial and social concern of the state, we cannot do better than to refer to the luminous opinions uttered by Judge Amidon of the Federal District Court upon the decision of this case below and of Justices Grace Bronson and Birdzell, who wrote opinions in the recent case of *Green v. Frazier* in the Supreme Court of North Dakota. Doubtless all of those opinions will have, as they merit, the attention of this Court; but particularly in connection with consideration of the Mill and Elevator Act, we cite pages 678 to 680 of *Scott v. Frazier,* 258 Fed. Rep., and pages 17 to 24 of *Green v. Frazier,* 176 N. W. Rep. The enlightening statements of facts contained in these opinions contribute to this discussion circumstances of commanding importance, all of which, as we understand, are matters of which those courts were right in taking judicial notice and which this Court will accept as stated by those local forums. The presentation of the subject considered in each of these opinions is so comprehensive, instructive and persuasive that it would be futile and vain for us to do more than submit this phase of the matter so presented to the consideration of this Court.

TITLE 10. *The Enterprises Involved: The Bank of North Dakota.*

Essentially involved in the successful operation of the enterprises authorized and commanded by the Mill and Elevator Act is that function of state activity set in motion by the provisions of the Bank Act (Transcript, pages 24 to 30). When we

consider how generally the institution of banking has been employed for centuries by various governments in Europe and this country, we may be pardoned for doubting whether the power of the State of North Dakota as employed in the terms of this act would have been brought in question, if the exercise of the state's powers to this end had not been intimately connected with the success of the North Dakota program. However that may be we are frankly at a loss to understand how the powers of the state as exercised under the provisions of the North Dakota Bank Act can seriously be questioned. We invite the closest scrutiny of the terms of that act and submit it without apprehension as to the judgment of the Court thereon.

For convenience of reference we have prepared a brief memorandum as to certain banking institutions well known in history, which illustrate the utility of the institution of banking as an adjunct of government, and as an instrumentality for the successful achievement of governmental purposes. This memorandum we subjoin to our brief as an appendix thereto.

TITLE 11. *The Enterprises Involved: The Home Building Association.*

The third and only remaining separate enterprise instituted by these laws is that found in the Home Building Association Act, (Transcript, pages 48 to 52). This law, as declared in its own terms, is enacted "for the purpose of promoting home building and ownership;" and its terms justify that declaration of purpose. In any community such a purpose is laudable. Again we refer with satisfaction to the admirable statements found in the opinion of Judge Grace of the Supreme Court of North Dakota in *Green v. Frazier*, 176 N. W. Rep. at pages 21 and 22. In that opinion reference is made to the

homestead laws of the United States. The homestead policy of the national government finds a natural and proper sequel in the home building policy of North Dakota. If the state policy is to be brought in question as not pursuing a public purpose, the policy of the United States with respect to homesteads should be brought to bar under the same accusation. The analogy is conclusive. The history of the development of the homestead system is of such interest and importance in this connection that we have prepared a further memorandum presenting the pertinent facts and have included that memorandum as a further appendix subjoined to this brief.

TITLE 12. *Public Purpose: Lack of Definition.*

We recognize the fact that both the decision of the District Court in this cause and the North Dakota Supreme Court in *Green v. Frazier* discuss the issues upon the hypothesis that it is to be decided by the Courts whether the enterprises involved are public or private. This hypothesis, while not conceded, was not disputed at length by these defendants in those courts, for the reason which may also have guided the judges in those forums, that certain expressions in cases decided in this Court seemed to make the issue determinative; and that in view of those expressions it was sufficient to uphold the legislation assailed upon the clear facts of its public character, without proceeding to consider the fundamental nature of constitutional government. Therefore it is found that both the United States District Judge in North Dakota, and the judges of the Supreme Court of that state, dwell at length upon the facts pertinent to that issue. Bue we find that at the outset of his consideration of the matter Mr. Justice Grace is embarrassed by a lack of definition of the terms involved. In view

of the principles involved that we have expressed elsewhere it is not necessary to enter upon the discussion of what such definitions should be; but if they were required it seems to us that the learned Justice of the North Dakota Court has well supplied the lack (*Green v. Frazier,* 176 N. W. 17).

The research of the distinguished United States District Judge for North Dakota, the results of which illuminate his opinion in this cause below, confirms Justice Grace's discovery of the absence of fixed definition, and shows the steady recession of the Courts from the assumption of power to restrain the advancement of popular control in matters adjudged by the people to concern their common welfare.

TITLE 13. *Public Purpose: Judicial Expressions in regard Thereto.*

In the absence then, of precise definition, we will submit certain propositions pertinent to the inquiry that are gleaned from the decided cases.

To determine whether a use is public or private we have to determine not merely whether interests of individuals will be promoted but whether the interests of the greater part of the community will be.

Olcott v. Fond du Lac, 16 Wal. 678.

"So far as authority to take the property for local public "purposes was concerned, the Circuit Court could not en- "force any other than the State law. It would respect the "sovereign power of the State to define the legitimate pub- "lic purposes for which private property may be taken, up- "on compensation to the owner being made or secured."

Traction Co. v. Mining Co., 196 U. S. 252, 253.

"But neither the (14th) Amendment,—broad and compre-
"hensive as it is,—nor any other amendment, was designed
"to interfere with the power of the state, sometimes called
"its police power, to prescribe regulations to promote the
"health, peace, morals, education and good order of the
"people, and to legislate so as to increase the indus-
"tries of the state, develop its resources, and add to its
"wealth and prosperity."

Barbier v. Connolly, 113 U. S. 27.

"The court held in these acts of Congress and in the joint
"resolution the intended use of this land is plainly set
"forth. It is stated in the second Vol. of Judge Dillon's
"work on municipal corporations (4th Ed., Sec. 600) that
"when the legislature has declared the use or purpose to
"be a public one, its judgment will be respected by the
"courts, unless the use be palpably without reasonable
"foundation. Many of the authorities are cited in the note,
"and, indeed, the rule commends itself as a rational and
"proper one."

U. S. v. Gettysburg Elec. Ry., 160 U. S. 680.

"The validity of such statutes may sometimes depend
"upon many different facts, the existence of which would
"make a public use, even by an individual, where, in the ab-
"sence of such facts, the use would clearly be private.
"Those facts must be general, notorious and acknowledged
"in the State. and the State courts may be assumed to be
"exceptionally familiar with them. They are not the sub-
"ject of judicial investigation as to their existence, but
"the local courts know and appreciate them. They under-
"stand the situation which led to the demand for an en-
"actment of the statutes, and they also appreciate the re-
"sults upon the growth and prosperity of the State, which

"in all probability would flow from a denial of its validi-
"ty."

Clark v. Nash, 198. U. S. 367.

"The provision of the 14th Amendment, embodying fun-
"damental conceptions of justice, cannot be deemed to pre-
"vent a state from adopting a public policy (for the irri-
"gation of lands.) States may take account of their spe-
"cial exigencies. It has been held that it is not necessary
"that the state power should rest simply upon the ground
"that the undertaking is needed for the public health; there
"are manifestly other considerations of public advantage
"in providing a general plan of reclamation by which wet
"lands throughout the state may be opened to profitable
"use."

O'Neil v. Leamer, 239 U. S. 244, 253.

There is little reason under our system of government for
acing a close and narrow interpretation on the police power,
restricting its scope so as to hamper the legislative power
dealing with the various necessities of society and new cir-
umstances as they arise calling for legislative intervention in
e public interest.

Budd v. New York, 143 U. S. 517.

"The police power of a state embraces regulations de-
"signed to promote the public convenience or the general
"prosperity, as well as regulations designed to promote
"health, morals or public safety."

C. B. & Q. Ry v. Drainage Commrs., 200 U. S. 561, 592.

"But the clause does not limit, nor was it designed to
"limit the subjects upon which the police power of the
"State may be exerted. The State can now, as before, pre-
"scribe regulations for the health, good order and safety
"of society, and adopt such measures as will advance its

"interests and prosperity."

Minneapolis Ry Co. v. Beckwith, 129 U. S. 26.

"Against that conservation of the mind, which puts to
"question every new act of regulating legislation and re-
"gards the legislation invalid or dangerous until it has be-
"come familiar, government—State and Nation—has press-
"ed on in the general welfare; and our reports are full of
"cases where in instance after instance the exercise of regu-
"lation was resisted and yet sustained against attacks
"asserted to be justified by the Constitution of the United
"States. The dread of the moment having passed, no one
"is now heard to say that rights were restrained or their
"constitutional guarantees impaired."

German Alliance Co. v. Kansas, 233 U. S. 409.

We must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statutes now under consideration were passed. If no state of circumstances could exist to justify such a statute, than we may declare these void, because in excess of the legislative power of the state. But if it could, we must presume it did.

Munn v. Illinois, 94 U. S. 113.

Amendment of a state constitution to give express authority for legislative enactment must be taken into consideration in determining the validity of laws.

Munn v. Illinois, 94 U. S. 113.

"In the first instance the duty devolves upon the legisla-
"tive branch of the government to determine whether or
"not a proposed tax is for a public purpose; and the courts
"are loath to interpose and declare any tax unlawful, and
"will only do so in case of a palpable disregard of the wis-

"limitations, express and implied, restricting the power of "taxation."

North Dakota v. Nelson Co., 1 N. D. 88.

Necessity alone is not the test by which the limits of state thority in taxation are to be defined, but wise statemanship ust look beyond expenditures absolutely needful and em- ace others which may tend to make government subserve the neral well being of society, and to advance the present and ospective happiness and prosperity of the people.

People v. Salem, 20 Mich. 452, 474.

"The time was when the policy was to confine the func- "tions of government to limits strictly necessary to secure "the enjoyemnt of life, liberty and property. The old Jef- "fersonian maxim was that the country is governed best "that is governed the least. At present the tendency is all "the other way and towards socialism and paternalism in "government. This tendency is perhaps to some extent "natural as well as inevitable as the population becomes "more dense, and society old and more complex in its rela- "tions. The wisdom of such a policy is not for the courts. "The people are supreme, and if they wish to adopt such a "change in the theory of government, it is their right to do so."

Rippe v. Becker, 56 Minn. 100.

ITLE 14. *Public Purpose: The North Dakota Enterprises: Conclusions upon the Facts.*

We submit in conclusion under this head that upon the facts volved, this Court will not, if it is deemed necessary to reach conclusion in regard thereto, hold that the purposes intended

by the North Dakota constitution and laws are private purposes, but will recognize the determination and declaration of the people of North Dakota and of their delegated representatives that their state constitution and these laws are the purpose and policy of a state of the Union, public in character and within the powers of statehood.

SECTION 10.

THE NORTH DAKOTA PROGRAM SUSTAINED BY PRECEDENTS IN THIS COURT.

TITLE 1. *The South Carolina Dispensary Case.*

Recalling the language of the North Dakota Constitution here drawn in question, viz., that "the state may engage in any industry, enterprise or business" (Transcript, page 6, folio 8), we find that provision supported by a case decided in this court.

In the case of *South Carolina v. United States*, 199 U. S. 437, the important question was whether persons selling liquor are relieved from liability for internal revenue tax by the fact that they have no interest in the business but are simply agents of a state which, in the exercise of its sovereign power, has taken charge of the business of selling intoxicating liquors. The power of a state to engage in such business was not drawn in question but the reasoning of the Court strongly if not conclusively tends to support the contention of these defendants. We quote from the opinion:

"Each state is subject only to the limitations prescribed "by the constitution and within its own territory is other- "wise supreme. Its internal affairs are matters of its own "discretion. * * * There is a large and growing move- "ment in the country in favor of the acquisition and man- "agement by the public of what are termed public utilities "including not merely therein the supply of gas and water "but also the entire railroad system."

"We may go even a step further. There are some insist- "ing that the State shall become the owner of all proper- "ty and the manager of all business. * * * *If this change "should be made in any state,* how much would that state "contribute to the revenue of the Nation? * * * Sup-

"pose a state assumes under its police power the control "of all those matters subject to the internal revenue tax "and also *engages in the business of importing all foreign "goods.* The same argument which would exempt the sale "by a State of liquor, tobacco, etc., from a license tax would "exempt the importation of merchandise by a state from "import duty." * * *

"The exemption of State agencies and instrumentalities "from National taxation is limited to those which are of "a strictly governmental character, and does not extend to "those which *are used by the State in the carrying on of "an ordinary private business.* * * * *Whenever a State "engages in a business which is of a private nature* that pur- "pose is not withdrawn from the taxing power of the Na- "tion."

South Carolina v. United States, 199 U. S. 437; 454, 455, 461, 463.

The view taken by this Court as to the power of a state to engage in business is indicated by the course of reasoning in the South Carolina Case. That line of reasoning seems to be as follows:

By the Federal Constitution it was provided that the Federal Government should have the power to raise taxes.

It was not intended, however, that the Federal government should have the power to tax property or instrumentalities of the State regarded as a power supreme in its own sphere.

But if the State enters upon business activities and thereby acquires property and employs instrumentalities in business uses, such property and instrumentalities must not be regarded as belonging to or exercised by the State in its sovereign capacity.

For the State might by acquiring all property and conducting all business, thereby render exempt from taxation all prop-

rty and instrumentalities of business within its borders.

The Federal government cannot be thus deprived of its power f taxation.

Property not essential to the State in its sovereign capacity ust remain subject to taxation by the Federal government. *The State might acquire all property and engage in all usiness.*

Therefore, the State might render all property and business xempt, unless property and business not essential to the sov-reign power of the State are withheld from exemption.

ITLE 2. *The North Dakota Constitution a Valid Exercise of the State's Power.*

When this Court, in the case just cited, stated a conclusion hat necessarily involves the premise that each state might cquire all property and engage in all business, it evidently ontemplated a condition of affairs which, however improbable, as constitutionally possible, and so much within possibility of act as to control the issue involved in that case. The provis-on in the North Dakota Constitution is less broad than the tate policy and purpose assumed by this Court to be within he constitutional powers of every state to adopt. Unless the ssumption of the state's constitutional powers in the South arolina case is wrong, the North Dakota constitution is valid.

ITLE 3. *The Portland Case.*

Rules for the ascertainment of a public purpose are stated in *Jones v. Portland*, 245 U. S. 217. The State Supreme Court f Maine had held that the maintenance of a municipal wood-ard was a public purpose. Upon review in this Court the laintiff in error relied upon the same line of cases that are ited by the appellants in this case. The proceedings here are o recent that we will not consider them in detail but we will ontent ourselves by referring to certain parts of the opinion.

written by Mr. Justice Day, which seem pertinent to the present controversy. As stated elsewhere in this brief, we do not understand that this Court intended, by quoting certain passages from the opinion in the Maine case, to adopt all the propositions contained therein, but rather to indicate the salient facts relied upon to determine the character of the enterprise as being public. For the sole question argued by counsel upon each side seems to have been whether the woodyard in question was to be regarded as a public or a private enterprise. Upon the issue so presented this Court held among other things that "a judgment of the highest Court of the State upon what should be deemed a public use in a particular state is entitled to the highest respect;" and that a decision of such State Court "declaring a use to be public would be accepted unless clearly not well founded." It naturally follows that when, as in the instant case, the judgment of the State Supreme Court is reinforced by the judgment of the District Court of the United States for the same state, their united conclusions will weigh all the more heavily against adverse claims. It seems to us therefore that the *Portland Case* is decisive of the case at bar in respect to the character of the North Dakota enterprises.

SECTION 11.

Other Instances of States Engaged in Business.

Without going into historical instances, or the multitude of municipal enterprises throughout the country, we cite a few instances of now existing state laws and constitutions whereby one or another state of the Union is engaged or interested in enterprises which are beyond the powers of a state to transact, if the enterprises conducted by the State of North Dakota are beyond such powers.

North Dakota has a state system of bonding officials, and has for years operated a street railway at Bismarck. For years also the State has operated a hail insurance business. (Sections 176-189, Comp. Laws of N. D. 1913).

The State of Montana has entered upon the enterprise of constructing and operating a terminal grain elevator to be aided by the issuance of bonds of the State. See Chapter 204 of the Laws of Montana, 1919.

The State of Ohio has inaugurated the policy and since 1912 has conducted the business of providing for workmen's compensation in case of injury. The course of the State in regard to the project is succinctly expressed in the opinion found in *Funding v. Industrial Commission*, 92 Ohio St. 434-435:

"The original Ohio workmen's compensation act was "passed May 31, 1911 (102 O.L., 524). Its purpose well "expressed in its title was, 'to create a state insurance fund "for the benefit of injured and the dependents of killed "employes, and to provide for the administration of such "fund by a State liability board of awards.' This act was "optional or elective in principle. On February 6, 1912, "its constitutionality was upheld by this court in the case "of *State ex rel. v. Creamer*, 85 Ohio St. 349. On Septem-

"ber 3, 1912, a constitutional amendment was adopted by
"the people of Ohio (Sec. 35, Article II), authorizing the
"passage of laws providing for a state fund to be created
"by compulsory contribution thereto by employers and
"administered by the State. Under this Ohio statute, the
"compensation fund itself is derived from payments made
"by employers of certain classes; but the administrative
"expenses incurred in the business of collecting and man-
"aging and distributing fund is paid by annual taxation
"levied upon the whole body of the taxpayers of the State
"as a part of the annual State tax levy."

The State of Washington in 1917, inaugurated a business system of compensation to injured workmen similar to the Ohio system which is now in force. See Chapter 28, Laws of Washington, 1917.

The State of Georgia has for many years owned and operated the railroad property and business known as the Western & Atlantic Railroad. We quote from Parks Annotated Code of Georgia 1914, Volume 1, this language from Chapter 4:

Section 1287: "Western & Atlantic Railroad Property of the State. The railroad communication from Atlanta, in Fulton County, to Chattanooga on the Tennessee River, is the property of this State exclusively and shall be known as the Western & Atlantic Railroad."

Section 1288: "Relation of the State to the Western & Atlantice Railroad. The State occupies the same relation to said road, as owner, that any company or corporation does to its railroad, and the obligations of the State to the public concerning said road, and of the public to said road are the same as govern the other railroads of this State, so far as is consistent with the sovereign attributes of this State, and the laws of force for its conduct."

In the State of South Dakota, by the present legislature, pro

vision has been made for the state's interesting itself in coal mining and in a state cement plant.

In the State of Arizona there was initiated in 1914, and made effective in the same year by majority vote of the people of the State, an act: "To promote the welfare of the people of the State of Arizona and to provide for the development of the resources of the State and to abolish the contract system of all State construction, and to establish a State Printing Plant and to establish a State Banking System and to make appropriation therefor." See Session Laws of Arizona 1915, p .19, of the last section of the valume. The powers granted by this initiative measure however, have not been put into operation by the State officers.

SECTION 12.

THE REAL ISSUE IS POLITICAL, NOT JUSTICIABLE.

TITLE 1. *Political Events Leading up to the Present North Dakota Program.*

The Third Session of the North Dakota Legislature passed an act appropriating one hundred thousand dollars for building a state elecator or warehouse at Duluth or West Superior (Chapter 61, Session Laws 1893, page 165).

The Eleventh Session passed a concurrent resolution amending the constitution by empowering he legislature to provide for building, leasing, purchasing and operating terminal elevators in the states of Minnesota, and Wisconsin, or either (Session Laws Norh Dakota, 1909, page 344). The Twelfth Session concurred in that resolution and it was submitted to the people (Chapter 87, page 161, Session Laws 1911). Thereafter it was adopted by an overwheming majority of the people and became part of the Constitution of the State. It is known as Article 14 of the amendments of the constitution.

The Twelfth Session passed a concurrent resolution amending the Constitution of the State by empowering the legislature to provide for the erection, purchasing and operating of terminal elevators in North Dakota (Chapter 90, page 165 Session Laws 1911). The Thirteenth Session concurred in that resolution, and it was submitted to the people. (Chapter 104, page 132, Session Laws of North Dakota 1913). Thereafter it was adopted by a vote of 51,507 against 18,483, and became what is known as Article 19 of amendments of the constitution (page 403, 404, Session Laws 1913).

The Thirteenth Session also passed an act to provide for funds for the maintenance, purchase, lease or establishment of

a terminal elevator system in Wisconsin or Minnesota, or in both, and to provide a tax on all property within the state for that purpose (See Chapter 279, page 435).

After that came the present amendments of he constitution which were adopted by the people and then the legislative enactment of the State Indusrial Program which was again referred to the people by referendum petitions and adopted by large majorities.

TITLE 2. *The Interest of the Appellants is Political, not Justiciable.*

The true interest of the appellants in this controversy is political, not justiciable. In the complaint they allege that the North Dakota program violates the guaranty of republican government (Transcript, page 13, folio 17). In their brief page 60), they make the same contention, as one of three claims under the Federal Constitution. As we have remarked before, the real issue amounts to this: the appellants do not approve the constitution and laws of North Dakota, and therefore those enactments should be void. The laws are bad laws, they say, and because the laws are bad, they express a purpose that ought not to be a public purpose, and their operation is not due process of law, and they are unconstitutional. This grievance frequently recurs in the brief: it may be called the dominant note. Instead of according the United States Court in North Dakota and the Supreme Court of that State, the regard due such forums, we are asked to receive their views subject to the intimation that they are "colored by the particular brand of political economy upon which these acts are grounded" (page 94).

That an undesired "brand of political economy" is what troubles appellants, appears again in their view of the Fourteenth

Amendment, as a protection against "enthusiastic legislation" (page 95), a protection also against "the vagaries of sociological dreamers" (page 96). In arguing as to what constitutes a public purpose, it is intimated that the North Dakota program is "an experiment in practical economics" (page 112); and in maintaining that the lack of necessity for the laws is so apparent that "no legitimate argument can be made" to the contrary, the nature of the laws is stated as being "some plan of social economics, or of economics socialized" (page 126).

As a further reason for disregarding the judgment of the people, and of the legislature, and of the Courts of North Dakota, as to the industrial requirements of that state, we are warned that this is "radical legislation," brought about by "emotional action on the part of the people" and by "political disturbances" (page 100).

Finally, in the view of the appellants, this economic experiment, this emotional radicalism, this enthusiastic legislation of a particular brand of socialized economics, becomes an abhorrent effort to "enlarge the power of state" (page 161), and they warn against that peril, "in these days when the power of the state is pressed to such an extent and when the urgency of so-called public purposes rests as a constant menace upon the sacredness of private property" (page 99).

If the statement of judicially-noted facts in Judge Amidon's opinion requires any confirmation in the matter of the steady-moving purpose of the people of North Dakota toward the achievement of the state's industrial program, that confirmation is here, in the vehement language of appellants. They have seen the ebb and flow of political battle, and they have not stood idle while it raged. They have seen the people of the state initiate amendments to their fundamental law, and then adopt them. They have seen the people, by reiterated majorities, send representatives to their capital to enact laws under

ir amended constitution. They have seen those laws adopt-
by two-thirds majorities, *and then upon referendum specifi-*
ly approved by the people. This is the common knowledge,
only of the people of North Dakota, but of observant peo-
of the entire land. This is the known political history
North Dakota in recent years. Appellants were dwelling in
making of that history; and of it some might in all modes-
say, "*magna pars fui.*" Yet now,—although this Court has
d, as all courts must hold, that long political discussion and
stitutional amendment should be considered in understand-
true public purposes,—now appellants reproach the state
ums for noting this history, and they ask the Court to ig-
re it. But their brief itself is witness of those events, and,
th its exaggerated denunciation and epithet, appropriate
ther to the hustings than to the hall of judgment, confirms
political character of the contested issues. Those issues be-
ng to the people. The minority were justified in opposing
ery step of the majority; but at length the majority prevailed.
e judgment so rendered by the people must be final. Ques-
ons of the nature determined by the people of North Dakota
e not for the Court. Though it were true that the laws were
perimental, economically unsound, the fabric of dreams, even
appellants say, yet as Justice Harlan wrote in *Atkin v. Kan-*
s, 191 U. S. 223, "no evils arising from such legislation could
more far-reaching than those that might come to our system
government if the judiciary, abandoning the sphere assigned
it by the fundamental law, should enter upon the domain of
gislation, and upon grounds merely of justice or reason or
isdom annul statutes that had received the sanction of the
eople's representatives,"—in this case, the sanction of the peo-
le themselves.

Conclusion

The North Dakota program is not a departure from the form or the spirt of American institutions. It lies within the powers of statehood, and illustrates the fitness of the American system for orderly progress, through the independent activities of the States. It gives new evidence of the capacity of a democratic people for self-government, and lightens a troubled time with a clear ray of hope.

By "the highest and most deliberate act of a free people" the North Dakota constitution has been made to express the people's will that the program should be accomplished. This is indeed a public purpose. There is in the constitution of the United States no prohibition of the State's power thus exercised, and no principle or canon drawn from any other source can defeat its control. The legislature has enacted laws appropriate to the end sought, and the defendants stand upon those laws.

The decree of the District Court should be affirmed.

Respectfully submitted,

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Appendix

Governmental Banks

The first public bank in Europe, the Banco di Rialto, was established by the Senate of Venice in 1584. The second, established in Venice under the name of Banco del Giro, in 1619, became the only public bank of the city, and was known as the bank of Venice.

The Banco del Giro appears to have been called into existence by national developments of trade. Francis A. Walker refers to it in the statement that "the profits of banking have been realized in a notable degree by several cities that were also States, as Hamburg, Venice and Amsterdam." (Political Economy, p. 430, Sec. 454). The Bank of Amsterdam (1609-1820), and the Bank of Hamburg (1619-1873) were respectively the most important and the longest lived of the old world system of exchange banks. They with others, established by governments, have demonstrated a utility in the development of the countries in which they have existed.

The Bank of Sweden (the Riksbank), was established in 1656. It still exists and has always been the State Bank of Sweden.

The Bank of England was founded in 1694; a small institution at first, with but few more than fifty employes, whose salaries aggregated forty-three hundred and fifty pounds—now a world power in finance, a prop of the British Empire.

The Reichbank, the most useful banking institution in Germany (at least until the recent war), was managed by a bank

directory appointed by the Chancellor of the Empire, up to the time of the empire's fall.

The first Bank of the United States was incorporated in 1791. The government subscribed one-fifth of its capital. Its charter expired in 1811.

The second Bank of the United States was chartered in 1816. Again the government took one-fifth of the capital stock. The President of the United States was authorized to appoint one-fifth of the directors; and public funds were to be deposited in the Bank, unless otherwise ordered by the Secretary of the Treasury.

This brief mention of historic instances serves to recall and illustrate the utility of banking institutions in serving a public purpose under divers circumstances of governmental interest, obligation and responsibility. As instrumentalities of public purpose, defined by law or decree, banks have been promoted, operated and owned, partially or wholly, with more or less investment and hazard of public funds and public credit, by many governments, of widely diverse forms and domain.

The latest instances of the use of banking systems for the accomplishment of public purposes are found in the Federal Reserve Act of 1913, and the Federal Farm Loan Act of 1916. The provisions of these laws are too well known to require statement here. We desire only to point out the feature of the reserve banking system which provides that the United States in certain contingencies shall buy the stock of the reserve banks at par, paying therefor with funds drawn from the national treasury (38 Stat. 251 U. S. Comp. Stat. 1918 Sections 9786-13); and the feature of the Federal Farm Loan Act providing that in certain contingencies it is the duty of the Secretary of the Treasury to subscribe to the stock of each Federal Land Bank and for such stock also to pay with public funds drawn from the national treasury (39 Stat. 364 U. S. Comp.

tat. 1918, Section 9835-c5). In each of these systems public noneys are invested in a banking business. In the case of he federal land banks it is provided that stock owned by the overnment of the Untied States shall receive no dividends. The apital of the federal land banks is to be used in making loans ecured by first mortgages on farm lands.

been made and lands have been made productive, *yielding a profit in crops to the farmer and increasing the resources of the nation* (*id.*, p. 215).

"The necessity of * * * giving a preference right to persons desiring to make homes [on the public domain] became more apparent" (*ibid*). The modification of the system of disposition of public lands which took ultimate form in the homestead laws, beginning with the act of May 20, 1862, first came under discussion as a national question in 1852, when a national political convention adopted, as a plank of its platform, a declaration that the public lands of the United States should not be sold but should be granted *free of cost* to landless settlers. Thereafter the question was mooted in the national forum and was the subject of platforms of political parties until 1862 (*id.* p. 332).

> "The rich and fertile lands of the Mississippi Valley were "fast filling up with settlers. Agricultural lands in the "Middle States, which, after the year 1824, were bought "for $1.25 per acre, now sold at from $50 to $80 per acre. "Former purchasers of these Government lands in the Mid-"dle, Western and Southern States, were selling their ear-"ly purchases for this great advance, and moving west, to "Iowa, Wisconsin, Minnesota, and Missouri, and there "again taking cheap Government lands under the pre-emp-"tion laws.
>
> "The western emigration caused a rush—a migration of "neighborhoods in many localities of the older Western "states. Following the sun, their pillar of fire, these State "founders moved westward, a resistless army of agents of "American civilization, and there was *a demand for homes* "on the public lands, and a strong pressure for the enact-"ment of a law which should confine locators to small

The National Homestead Policy, and its Relation to the Home Building Program of North Dakota.

The homestead laws of the United States, as a policy of disposition of the public lands of the nation, followed the system provided in the pre-emption acts. In 1790 Alexander Hamilton, Secretary of the Treasury, presented to the Congress a plan for the disposition of public lands, in which he said that "in the formation of a plan for the disposition of the vacant lands of the United States there appear to be two leading objects of consideration: one. the facility of advantageous sales, according to the probable course of purchases; the other the accommodation of individuals now inhabiting the western country or who may hereafter emigrate thither. The former, as an operation of finance, claims primary attention; the latter is important as it relates to the satisfaction of the inhabitants of the western country." Hamilton presented also details of administration; and his report formed the basis of the disposition of the public domain from that time forward. Thus early "the accommodation of individuals" and "the satisfaction of the inhabitants" especially concerned, as personal beneficiaries of the grant of public lands, became the national policy as a means of promoting the general welfare. The pre-emption acts, beginning in 1801, enacted that policy into law, offering "a *premium* in favor of and condition for making permanent settlement and a home, a *preference* for actual tilling and residing upon a piece of land" ("The Public Domain," Ex. Doc. 47, Part 4, 46th Congress, 3rd Session, H. of R., p. 214).

The pre-emption system grew out of consideration for the needs of settlers. The early idea of sales for revenue was abandoned; and a plan of disposition *for homes* was substituted. It has been many-phased, but it has always contained the germ of settlement, under which thousands of homes have

"tracts, and require actual occupation, improvement and "cultivation" (*id.*, pp. 332, 333).

The first homestead bill offered in Congress was defeated in 1859. But in the following Congress "a bill to secure homesteads to actual settlers on the public domain" was passed. It was vetoed by President Buchanan, June, 1860, who objected that Congress had no power to give away the public lands (*id.*, p. 342; 5 Messages 609). But in 1862, a similar bill was enacted and was signed by President Lincoln. In his first annual message President Johnson said of this law, "the homestead policy was established only after long and earnest resistance. Experience proves its wisdom. The lands in the hands of industrious settlers, whose labor creates wealth and contributes to the public resources, are worth more to the United States than if they hade been reserved as a solitude for future purchasers." (6 Messages 362).

The essence of the homestead law and the amendments is embodied in the conditions of actual settlement. *It gives for a nominal fee* 160 acres of land to the settler who complies with its terms, "in good faith *to obtain a home* for himself" ("The Public Domain," ut. sup., p. 350; Sec. 4531 U. S. Comp. Stat. 1918, "Compact Edition;" R. S. Sec. 2290, amended March 3, 1891, C. 561, 26 Stat. 1097).

> "The homestead act stands as the concentrated wisdom "of legislation for settlement of the public lands. *It pro-* "*tects the government, it fills the states with homes,* it "builds up communities, and *lessens the chances of social* "*and civil disorder* by giving ownership of the soil, in "small tracts, to the occupants thereof. It was copied "from no other nation's system. It was originally and "distinctively American, and remains a monument to its "originators" ("The Public Domain," p. 350).

This is the measure to which Emerson referred, when, group- it among the "moments of expansion in modern history," h the English Commonwealth of 1648, the Declaration of lependence, the repeal of the Corn-Laws and the Emancipa- n Proclamation, he characterized them all as "acts of great pe, working on a long future, and on permanent interests, l honoring alike those who initiate and those who receive m. These measures provoke no noisy joy, but are received o a sympathy so deep as to apprize us that mankind are great- and better than we know." While each of these events was sally of the human mind into the untried future," yet it s "a step forward into the direction of catholic and universal erests" ("The President's Proclamation," in The Atlantic nthly, Vol. 10, p. 638, November, 1862).

The homestead law owes its "origin to the *demand for a ulation of the right sort* in a new country, to the conviction t the freeholder rather than the tenant is the *natural sup- ter of popular government,* * * * and to belief that such s *encourage the stability of the family*" (Article by Newton Mereness, Enc. Brit. 11th Ed. XIII, 639).

We are not aware that President Buchanan's contention t the homestead law was invalid, as an attempted disposition public property for a private purpose, was ever brought o court. It is safe to assert, however, that the law is in- testably supported upon the grounds stated above.

The enactment of the Home Building Association Act by the islature of North Dakota was another "step forward" in direction pointed by the National homestead act. Almost hout variation the historic, economic and sociologic rea- s for the enactment of the homestead act and for its suc- ful operation, that we have recited in the foregoing para- phs, may be truly and aptly repeated in support of the poli-

cy of North Dakota in furtherance of home building under its jurisdiction. That that policy is the formulation of a public purpose, in view of the unanimous judgment of American statesmen of this day as to the homestead laws, it would be idle to dispute. The general welfare of the state is intimately and essentially involved in any policy that will introduce "a population of the right sort," "encourage the stability of the family," and produce citizens who become "natural supporters of popular government." These results the Home Building Law will help to accomplish, just as truly as the Homestead Law will continue so to do. It is indeed "a sally into the untried future," but it holds out large promise of being "a step forward in the direction of catholic and universal interests."